16-395

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 962.

HENRY SEYMOUR KING, APPELLANT,

vs.

FRANKLIN C. CORNELL, ADMINISTRATOR OF EZRA CORNELL, DECEASED; THE UTICA, ITHACA AND ELMIRA RAILROAD COMPANY ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 4, 1882.

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Supreme court, Tompkins County.

FRANKLIN C. CORNELL, AS ADMINISTRATOR OF the goods, chattels, and credits of Ezra Cornell, deceased,
against
THE UTICA, ITHACA AND ELMIRA RAILROAD Company et al.

PAPERS ON APPEAL FROM ORDER.

Evarts, Southmayd & Choate, attorneys for defendants King and the railway company.

1 At an adjourned term of the circuit court of the United States of America for the northern district of New York, in the second circuit, held at the city of Albany, on Tuesday, the seventeenth day of January, in the year of our Lord one thousand eight hundred and eighty-two.

Present, the honorable William J. Wallace, judge.

FRANKLIN C. CORNELL, ADMINISTRATOR, &C.,
vs.
THE UTICA, ITHACA & ELMIRA RAILROAD CO. et al.

On reading and filing papers of record in the supreme court of the State of New York, Thompkins County, in the above-entitled cause, and on motion of Messrs. Evarts, Southmayd and Choate,

Ordered that the said cause be, and the same is hereby, entered in this court, and that the appearance of the defendant H. S. King, by the said Evarts, Southmayd & Choate, as his solicitors, be, and the same is hereby, entered in this court.

2 Supreme court, Tompkins County.

FRANKLIN C. CORNELL, AS ADMINISTRATOR OF the goods, chattels, and credits of Ezra Cornell, deceased,
against
THE UTICA, ITHACA AND ELMIRA RAILROAD Company; the Utica, Ithaca and Elmira Railway Company, Henry V. Poor, Thomas N. Rooker, William L. Burt, John Greenough, Henry W. Poor, Joseph Rodbourn, Henry Samuel King, Henry Seymour King, and Enos Wilder.

STATE OF NEW YORK,
County of Tompkins, ss:

Franklin C. Cornell, the plaintiff in the above-entitled action, being duly sworn, says that he is such plaintiff, and, the administrator of the goods, chattels, and credits of Ezra Cornell, deceased; that annexed hereto and

forming a part of this affidavit is a copy of the complaint in this action sworn to by this deponent on the 26th day of June, 1878; that all of the allegations in said complaint are true of the deponent's knowledge, except those contained in the 18th, 19th, 20th, 24th, and 25th folios
2½ thereof, and so much of the 28th folio thereof as commences with the words "which plaintiff" and ends with the words "other claims thereon," and excepting the first four lines of folio 30 thereof and the last three lines of folio 31 thereof, and all of folio 33 except the last line thereof, and so much of folios 35 and 36 as begins with the words "plaintiff further alleges" and ends with the words "unable to state," and excepting the last three lines of folio 37 and the first three lines of folio 38 therein; that the allegations of said complaint that are not true to deponent's knowledge, but are alleged to be true on his information and belief as above stated, relate to other defendants in this action than the Utica, Ithaca & Elmira Railway Company; that deponent further says that Joseph Rodbourn is a director of the Utica, Ithaca and Elmira Railway Company, and has been since the organization thereof; that on the ninth day of November, 1880, deponent saw said Rodbourn at Brecsport, N. Y., and said Rodbourn then and there told this deponent that the week previous there was a meeting of the directors of the Utica, Ithaca & Elmira Railway Company held in the city of Elmira; that he, the said Rodbourn, was present thereat; that that at such meeting a resolution was passed by said directors authorizing the issue of bonds secured by a mortgage upon the real and personal property and franchises of the Utica, Ithaca and Elmira Railway Company, to the extent of six hundred thousand dollars; that said deponent is informed by the premises and verily believes that said bonds are about to be issued and negotiated by and on behalf of said railway company, secured by a mortgage as aforesaid, and put upon the market and sold so as to be held and owned by persons other than this plaintiff; that such issuing and negotiating of bonds will be in violation of the rights of the plaintiff, and will tend to render any judgment that he may recover in this action wholly ineffectual.

3 That this action was commenced in the summer of 1878, and that service of process therein has been made upon all the defendants.

That there is no regular special term of this court to be held within the next twelve days to which an application can be made for an injunction at the first day thereof, upon the usual notice of eight days; that the rights of deponent are so important, and the hazard so great, that he desires an order to show cause, returnable at an adjourned special term to be held at Ithaca, December 8, 1880.

FRANKLIN C. CORNELL.

Subscribed and sworn to before me this 24th November, 1880.

M. VAN CLEEF,
Notary Public.

FRANKLIN C. CORNELL, AS ADMINISTRATOR OF the goods, chattels, and credits of Ezra Cornell, deceased,

against

THE UTICA, ITHACA AND ELMIRA RAILROAD Company; The Utica, Ithaca & Elmira Railway Company, Henry V. Poor, Thomas N. Rooker, William L. Burt, John Greenough, Henry W. Poor, Joseph Rodbourn, Henry Samuel King, Henry Seymour King, and Enos Wilder.

The complaint of the plaintiff respectfully shows to the court:

That prior to the 29th day of October, 1874, a line of railroad was in process of construction from Elmira, in the county of Chemung, to Cortland, in the county of Cortland, and passing through portions of the counties of Tioga and Tompkins; that during its construction, the defendant William L. Burt was the president of the company, engaged in the construction thereof, and the active manager and agent for and on behalf of such company, which was duly incorporated under the name and style of the Utica, Ithaca and Elmira Railroad Company; that prior to said October, 1874, Ezra Cornell, then of Ithaca, New York, but since deceased, had also been engaged in the construction of said road, as a contractor for the building of the same, and as such contractor had ad-
5 vanced large sums of money and incurred great liabilities for which the said company was indebted to him, and for a portion of which he had received and then held and owned the bonds of said company, issued under and protected by a first mortgage upon its road, real estate, equipment, and appurtenances; that the defendant Joseph Rodbourn had largely aided and assisted in said construction, and in so doing had advanced several and large sums of money for which said railroad company had become and remained indebted to him; that said railroad being still incomplete, and needing and requiring large sums of money to finish the same, and said Cornell, as contractor, having borrowed large amounts to aid in such construction, and being unable to make further advances until the bonds of said company could in some manner be sold and turned into money, and the defendant John Greenough representing that he could sell the same in England, a contract was duly made and executed on said 29th day of October, 1874, by and between said Utica, Ithaca and Elmira Railroad Company, Ezra Cornell, William L. Burt, Joseph Rodbourn, Henry V. Poor, Thomas N. Rooker, and John Greenough, wherein and whereby it was, among other things, mutually covenanted and agreed as follows:

1st. That said Cornell should transfer to Henry V. Poor and Thomas N. Rooker, as trustees under said contract, for the purposes thereof, 5,040 shares of the capital stock of said company, which he had received, and of which he was the owner under his contract, for the construction of said road; and convey to said company all the property, rolling stock, and material owned by him or contracted for in the process of constructing said railroad and appertaining thereto; and also to pay certain outstanding ac-

counts for construction, amounting to about twenty thousand dollars.

6 2d. That said railroad company should assume and pay all the expenses of the construction of said road, and release and discharge said Cornell from all liability on account of the construction, contracts, or expenditures.

3d. The defendant Joseph Rodbourn agreed to release said Cornell from all claims for advances made, and to transfer to said company all timber, ties, and material furnished or contracted to be furnished by him, and that for all indebtedness due him from said Cornell or said company, for his advances as aforesaid, he would accept and receive the obligation of said company secured by their first-mortgage bonds, which he agreed to hold and carry for three years from the date of said contract.

4th. The defendant William L. Burt agreed also to release all claims against said Cornell for advances made by him and through him by the defendant Enos Wilder, and to accept therefor the like mortgage bonds of said company and hold them for three years.

5th. Three schedules were to be annexed to said contract, showing the items and amounts of the sums to be paid by said Cornell, and of the indebtedness of the company to said Burt and Rodbourn, but as matter of fact the schedule of sums to be paid by said Cornell was the only schedule of items attached to said contract, and marked Schedule A, while Schedule B, referring to the advances of said Rodbourn, stated no items or amount, but referred to the account in said Cornell's hands, deducting from it $15,000, and adding to it $10,000 for ten miles of ties on hand; and the statement of said Burt's alleged account was declared to be that on files of the company, and according to an alleged settlement with them made Nov. 12th, 1874, amounted to $77,062.15, and which statement was marked Schedule C.

7 6th. It was further agreed that the issue of bonds to said Burt and Rodbourn as aforesaid should be at the rate of fifty cents on the dollar, or two dollars of bonds as security for one dollar of debt, and that $30,000 of said bonds then at that time in the hands of Enos Wilder, as security for advances made by him in the name of said Burt, should be treated as part of the security to which said Burt was entitled; that all coupons on such bonds so provided for the security of said Burt and Rodbourn should be cut off and cancelled to January 1st, 1875; and in case said company defaulted in their interest on the bonds outstanding other than those issued to said Burt and Rodbourn, then these last were at once to become due and payable both as to interest and principal.

7th. It was further agreed that said Cornell should be deemed the holder of all the first-mortgage bonds of said company at that time issued, and all those to be thereafter issued for fourteen miles of new road to be constructed between Horseheads and Cortland, being a total of one million and three hundred and sixty-five thousand dollars, except $18,000 held by Charles P. Wood, and except those provided to be issued to said Burt and Rodbourn for security as aforesaid; that thereupon the said three parties, for the purpose of converting said bonds into money, agreed to furnish them for sale in England, contributing them to the market as sales progressed pro rata; the first one-third thereof to be sold at not less than 60 cents gold, the second one-third at 65 cents gold, and the last and remaining

one-third at 70 cents gold; and if any sums should be obtained in excess of these rates one-half of such excess was to be retained by the defendant Greenough as compensation for selling said bonds, but the other half of such excess was to be added to the sale price and accounted for as proceeds of said bonds.

8 8th. It was further agreed that the proceeds resulting from such sales should be appropriated and disposed of as follows, viz: The first proceeds thereof were to be applied to relieve and redeem the bonds pledged by said Cornell, and to pay his obligations secured thereby, which obligations were at the time supposed to be about the sum of two hundred and fifty thousand dollars; the next two hundred and fifty thousand dollars realized from the sale of said bonds was to be appropriated to the construction and completion of said railroad, and until the payment of said Cornell's debt and redemption of his bonds pledged therefor, and the appropriation of $250,000 to the completion of said road, all the proceeds of such sales, without any diminution for expenses of sale, were to be used for such purposes.

9th. After sufficient proceeds from the sale of bonds had been received and used to effect the two purposes above stated, within the limitations provided, then the after proceeds of such sales were to be disposed of as follows: First, to pay the indebtedness due to said Burt and Rodbourn, respectively; and, second, the whole remaining balance to be paid over to said Cornell.

10th. It was further agreed that the sales of said bonds and the control and direction of such of them as were pledged and should be redeemed, and all the management of the same, and the bonds themselves should be placed under the control and in the hands of the defendants Henry V. Poor and Thomas N. Rooker, as trustees, and that such trustees, after the first five hundred thousand dollars had been by them received from sales of said bonds, should deliver absolutely to the parties furnishing the money the 5,040 shares of stock of said company assigned by said Cornell to said trustees.

11th. The said company further agreed for and in full of its re-
9 maining indebtedness to said Cornell to pay him two hundred and fifty thousand dollars in five years from the date of said contract, with interest.

12th. The said John Greenough agreed to enter upon the work of selling said bonds in England, and was to have the exclusive right to sell the same for ninety days after the date of said contract, and thereafter it should be open for any other parties in common with him to sell said bonds unless he should have, at the expiration of said ninety days, made sale of such bonds to an amount that should satisfy said trustees of his ability to effect the entire sale; for which service of selling said bonds, and for all services relating thereto, he, the said John Greenough, was to receive one-half the surplus, if any, realized from the sale of said bonds over and above the prices fixed in said contract, and in addition thereto the said 5,040 shares of the capital stock of said company.

13th. And it was further agreed that the whole of the two hundred and fifty thousand dollars to be applied to the completion of said railroad should be and remain in the custody of said trustees until the same should be expended from time to time upon said work.

And the said plaintiff refers to said contract for other and more complete details and for the precise and accurate terms thereof.

The said plaintiff further says, upon his information and belief, that when said contract was executed by said Ezra Cornell on his part, he, the said Cornell, had never seen nor examined the account of said Burt for which said Burt claimed said Cornell was liable to pay as contractor, and which by said contract the said Cornell assumed and agreed to pay, out of the mortgage bonds belonging to him, said Cornell, and supposed the same to be just and true, and that its items had been carefully examined
10 by the board of directors of said railroad company, and that the items and details of said account were to be and would be attached to said contract; but the plaintiff alleges that, in truth and in fact, the said account of said Burt was incorrect, inaccurate, and untrue, and made fraudulently with intent to deceive and defraud said Cornell and said railroad company, and was smuggled through said board of directors in the absence of said Cornell, and audited without careful examination and in sole reliance upon the assurances of said Burt.

And the plaintiff alleges, upon his information and belief, that at the date of said contract the said William L. Burt, for himself and the said Enos Wilder, had not, in truth and in fact, advanced for the benefit of said railroad company more than the sum of thirty-six thousand dollars, and the said Cornell, as contractor, and the said railroad company were in no respect liable to him for more than the said sum, but the same, by fraud and imposition, was more than doubled, and such gross sum attached to said contract as being the true indebtedness to be paid to said Burt, whereas, in truth and in fact, such indebtedness to said Burt was only about the sum of $36,000, and to that amount only was he justly entitled by the terms of said contract to share in said bonds and the proceeds of the sale thereof.

And the plaintiff further alleges that, after the execution of said contract, the said Ezra Cornell, during his lifetime, and this plaintiff, since his death, have duly and fully performed and kept all the terms and conditions of said contract to be by them kept and performed; that said Cornell died on the 9th day of December, 1874, leaving no will, and the said plaintiff was duly appointed by the surrogate of Tompkins County, he having jurisdiction for that purpose, administrator of the goods, chattels, and credits of said Ezra Cornell, deceased.

The plaintiff further alleges that soon after the execution of said contract the parties thereto entered upon the performance thereof; that
11 a large amount of said bonds were sent to England for the purpose of being sold and delivered to purchasers there, and the said John Greenough began the work of selling the same, and from time to time sold large quantities of the same; that the said plaintiff does not know with accuracy and certainty what quantity were sold, and for what amount, but alleges that not less than nine hundred and forty-six of said bonds were sold under said contract, and for a sum not less than seven hundred and sixty-four thousand three hundred and thirty-five dollars, or, if sold for a less amount than that, were so sold in violation of said contract, leaving the said trustees and the said Greenough accountable for that amount, and leaving still four hundred and one of said bonds wholly unsold or unaccounted for, except that $25,000 are held and owned by Mrs. Thomas N.

Rooker, and $15,000 by the plaintiff, and $20,000 were delivered to said Rodbourn on his account, leaving a balance of bonds to be accounted for by said trustees and said Greenough of $341,000, or 341 bonds of $1,000 each.

The plaintiff further says, on his information and belief, that the defendant, Henry W. Poor, who is a son of the defendant Henry V. Poor, acted as the agent of said trustees or of the said Henry V. Poor, and took upon himself the active management of the affairs of said trust and joined and conspired with the said Henry V. Poor to divert the funds resulting from said contract to purposes not authorized by it, as hereinafter stated and set forth.

The plaintiff further says, on his information and belief, that out of the proceeds of said bonds sold by said Greenough in England there is claimed to have been paid by said trustees on account of the indebtedness of said Ezra Cornell, and to relieve his bonds as provided by said contract, the sum of three hundred and eleven thousand seven hundred and ninety-four dollars and thirty-eight cents; but plaintiff alleges, on his information and belief, that the whole debt of said Cornell provided by said con-
12 tract to be paid out of said bonds did not exceed two hundred and sixty thousand dollars, and with the interest accrued thereon did not exceed three hundred thousand dollars, and all sums if any paid in excess thereof were paid in violation of said contract.

The plaintiff further says that of the remaining proceeds of said sales there is claimed by said trustees to have been paid to said railroad company for construction and completion of said road the sum of $242,986.74, but the plaintiff alleges that there are included in said sum a large amount of expenses and salaries not warranted by said contract and not payable out of the proceeds of said bonds.

The plaintiff further says that after deducting from the proceeds of the sales of the 946 bonds, at the contract price, the two sums alleged to have been paid by said trustees, viz, $311,794 for the debts of Ezra Cornell and $242,986 for construction of road, there remained a balance in the hands of such trustees applicable to the remaining purposes of the trust of two hundred and nine thousand five hundred and fifty-five dollars.

The plaintiff further says that out of this balance there was paid to Joseph Rodbourn as claimed by said trustees the sum of $39,489.60, which sum was nearly if not quite all of the indebtedness due to said Rodbourn provided to be paid by said contract, and there was further paid to said William L. Burt by said trustees, out of the proceeds of said bonds, the sum of forty-five thousand one hundred and seventy-six dollars and seventy-two cents, which plaintiff alleges on his information and belief was an overpayment and more than the just and true indebtedness due to said Burt; and that by these payments said Burt and said Rodbourn were fully paid all sums to which they were entitled out of said proceeds of such bonds, and have no further or other claims thereon; that, deducting these payments to said Burt and Rodbourn, there still remained of the proceeds
of the 946 bonds sold at the contract prices the sum of one hun-
13 dred and twenty-four thousand eight hundred and ninety dollars, which by the terms of said contract belonged to and should have been paid over to the plaintiff; that out of such sum about thirty-four thousand six hundred and six dollars was allowed by said plaintiff and

said Rodbourn, to be paid upon interest coupons to prevent a default on said bonds; that the balance, amounting to about ninety thousand two hundred and eighty-four dollars, has never been paid to this plaintiff nor any part thereof; and plaintiff alleges, on his information and belief, that the defendants Henry V. Poor, Henry W. Poor and William L. Burt, colluded and conspired together to convert and misappropriate said sum, and did so convert and misappropriate the same by paying it out upon alleged debts of said railroad company not authorized by said contract, and for expenses and salaries not authorized, and retaining and withholding same for their own use and benefit.

And plaintiff alleges that such balance belongs and is payable to him from the said trustees and from the said parties who have converted the same, and further alleges that the balance of said bonds, viz, 341 bonds of one thousand dollars each, or the proceeds thereof, are the property of and belong to this plaintiff and have never been delivered to him; that of these 208 bonds are in the possession of said John Greenough, who refuses to deliver the same to the plaintiff, although the plaintiff has duly demanded the same; that as to the remainder the said plaintiff alleges on his information and belief that they have been in some manner and for some price sold by John Greenough, but what has become of them or their proceeds the plaintiff has no sufficient knowledge, though he believes they have been misappropriated and converted to uses foreign to the contract.

The plaintiff further says that during the year 1877 default was made by said railroad company in the payment of interest upon its said
14 mortgage bonds, whereupon proceedings were commenced by the trustee of said mortgage for the foreclosure of the same by action in the supreme court, and thereafter judgment of foreclosure was duly made and the property of said company covered by said mortgage and described therein was duly advertised for sale.

That as plaintiff is informed and believes, at the date of such advertisement, almost if not quite all of the mortgage bonds of said railroad company sold in England were held and owned by the firm of Henry S. King and Company, consisting of the defendants, Henry Samuel King and Henry Seymour King, who reside in London, England, and who, together with the plaintiff and the said Rooker, Burt, and Rodbourn, constituted nearly if not quite all the bondholders interested in the foreclosure of said mortgage and in the results thereof; that before the sale took place an agreement was made between said Henry S. King and Company and this plaintiff that on such foreclosure the property covered by said mortgage should be bid in by said Henry S. King and Co. for the joint use and benefit of said King & Co., and this plaintiff, in proportion to their respective rights and interests as holders or owners of bonds, each party bearing a ratable proportion of the expenses, and that after such purchase and the giving of the referee's deed a new company should be organized to take said property and operate said road, which new company should execute a new and first mortgage upon the property purchased, and should give to the said Henry S. King and Company and to the said plaintiff bonds of said new company, covered and protected by said mortgage for the exact equivalent, bond for bond, of the bonds under the foreclosed mortgage held or owned by the said King & Company and the said plaintiff, in consideration whereof said plaintiff was to permit said purchase by said King & Co. without let or hindrance from him, said plaintiff.

15 Plaintiff further alleges that before said sale, as plaintiff is informed and believes, the said defendant, Burt, claiming to be a bondholder, and as such interested in said foreclosure and sale, made and entered into a similar agreement with said Henry S. King & Company, but the precise terms and details of which plaintiff is unable to state; and that by reason of such agreements, and in reliance thereon the said plaintiff and the said Burt both omitted to bid on said sale, and thereupon, at such sale and in the month of April last, the said property covered by said mortgage was struck off to an agent of Henry S. King & Company, for them and their use, and a referee's deed given accordingly; that thereafter such further proceedings were had that a new company was formed to own and operate said railroad, by the name and title of the Utica, Ithaca and Elmira Railway Company, and the same is duly organized and incorporated, and is the same named as one of the defendants in this action; that the same is in fact wholly owned and controlled by said Henry S. King & Company under and in accordance with the agreements hereinbefore recited.

That, as plaintiff is informed and believes, the said Henry S. King & Company, and the said Utica, Ithaca and Elmira Railway Company are ready and willing to carry out the agreement and arrangement aforesaid by the issue of new bonds to the amount of old bonds held by said King & Company, by said plaintiff, and said Burt and Rodbourn, and to issue and deliver them to the parties entitled in the place and stead of said old bonds, but are unable to do so until the ownership of said old bonds is settled, and the respective rights of the parties adjudged.

The plaintiff further alleges that the sale of said bonds in England has utterly ceased and ended, and no market remains there for them, and the said John Greenough has ceased all efforts to sell the same, and has no right under said contract further to sell the same.

16 Wherefore the plaintiff demands judgment that the said John Greenough render an account of his sales of said bonds and his disposition of the proceeds, and of any bonds remaining in his hands unsold, and be adjudged to deliver to the plaintiff all such bonds, and to pay to the plaintiff the one-half of all sums received by him in excess of the contract price of said bonds, and be enjoined by the injunction order of this court from in any manner selling or disposing of such bonds or parting with the custody thereof, or delivering the same, or any part thereof, to any person or persons, except under the order of this court; that the said Thomas N. Rooker and Henry V. Poor render an account of their trust and of all their dealings with said bonds or the proceeds thereof, and of all their receipts and payments as such trustees, and be adjudged to deliver over to the plaintiff all unsold bonds in any manner in their custody or control, and to pay to the plaintiff all sums received by them not properly paid out under said contract and in any manner used, converted, or retained by them in violation of the terms of said contract, and that they be restrained by the injunction order of this court from in any manner transferring or disposing of any of the unsold bonds referred to in said contract; that the said William L. Burt render an account of all sums advanced by him to said Utica, Ithaca and Elmira Railroad Company, and of all payments made to and money and securities received by him, and of all sums received by him from the trustees in said contracts, and of all bonds heretofore received by

him or now in his possession, or that of said Wilder, and that said Burt and said Wilder be adjudged to have been paid in full, and to have no claim under said contracts upon the bonds unsold, or the remaining proceeds of those sold, or against said Henry S. King & Co., or the Utica, Ithaca and Elmira Railway Company for the new bonds to be by them issued, and that said Burt and Wilder deliver over all of the bonds now in their possession or their control, either alone or in
17 conjunction with said John Greenough, his agents or servants, and be restrained by the injunction order of this court from in any manner interfering with the same or transferring the possession thereof, except under the order of this court; that the accounts of said Rodbourn be rendered and settled, and if any sum appears his due under said contracts, that the same be paid him by said trustees out of the surplus funds in their hands not as yet paid out under said contract; that said Henry W. Poor render an account of his dealings with said trust fund, and the bonds referred to in said contract, and of all of the same in any manner received by him, and account for and pay over the proceeds thereof, and pay to the said plaintiff or the parties entitled all sums unaccounted for by him, and that he deliver to the plaintiff all bonds referred to in said contract now in his possession or under his control, and be restrained by the injunction order of this court from in any manner interfering with the same or transferring the possession thereof; that the plaintiff recover of said John Greenough, Thomas N. Rooker, Henry V. Poor, Henry W. Poor, and William L. Burt, the sum of one hundred thousand dollars, and be adjudged to be the owner and entitled to the possession of 341 bonds described in the complaint, with the unpaid coupons belonging thereto, and all coupons paid out of the proceeds of the sales of said bonds, and to have and receive from said Henry S. King & Co., and from the Utica, Ithaca, and Geneva Railway Company an amount of new bonds on their road equivalent to plaintiff's ownership in the bonds referred to in said contract, and that said railway company deliver them accordingly; that a receiver be appointed of all the unsold bonds referred to in said contract, according to the course and practice of the court, and the same be delivered to him to be disposed of under the order of the court, and for such other and further order or relief as to the court shall seem just.

F. M. FINCH,

Plaintiff's Attorney. Office 18 *N. Tioga St., Ithaca, N. Y.*

18 TOMPKINS COUNTY, *ss:*

Franklin C. Cornell being duly sworn, says he is the administrator and plaintiff above named; that the foregoing complaint is true of his own knowledge, except the matters therein stated to be alleged on his information and belief, and as to those matters, he believes it to be true.

FRANKLIN C. CORNELL.

Sworn before me this 26th day of June, 1878.

M. VAN CLEEF,
Notary Public.

At a special term of the supreme court, held at the court-house in Ithaca, Tompkins County, on the 27th day of November, 1880.

Present, Hon. Wm. Murray, a justice of said court.

Supreme court, Tompkins County.

FRANKLIN C. CORNELL, AS ADMINISTRATOR of the goods, chattels, and credits of Ezra Cornell, deceased,

against

THE UTICA, ITHACA AND ELMIRA RAILROAD Comp'ny, The Utica, Ithaca and Elmira Railway Company, Henry V. Poor, Thomas N. Rooker, William L. Burt, John Greenough, Henry W. Poor, Joseph Rodbourn, Henry Samuel King, Henry Seymour King, and Enos Wilder.

Upon reading and filing the complaint in this action duly verified, and the affidavit of Franklin C. Cornell, sworn to on the 24th day of November, 1880, and on motion of S. H. Wilcox, plaintiff's attorney—

Ordered, that the defendant the Utica, Ithaca and Elmira Railway Company show cause before an adjourned term of this court, at the chambers of the Hon. Douglass Boardman, one of the justices of this court, in the village of Ithaca, county of Tompkins, and State of New York, on the 8th day of Dec., 1880, at 10 o'clock a. m. of that day, or as soon thereafter as counsel can be heard, why a temporary injunction should not be granted in this action restraining the said defendant, The Utica, Ithaca and Elmira Railway Company, its officers, attorneys, and agents, from issuing or negotiating any bonds of the Utica, Ithaca and Elmira Railway Company, and from securing the same by mortgage upon any of its property, real or personal, or upon its franchises, until the further order of the court, and in the meantime and until the hearing and decision of the application for an injunction upon the return of the order to show cause the said defendant, The Utica, Ithaca and Elmira Railway Company, its officers, attorneys, and agents be, and they are hereby, enjoined and restrained from issuing or negotiating any bonds of the said The Utica, Ithaca and Elmira Railway Company, and from giving any mortgage upon the property, real or personal, or the franchises of the said The Utica, Ithaca and Elmira Railway Company.

The grounds upon which this preliminary injunction is granted are that the defendant The Utica, Ithaca and Elmira Railway Company is about to issue and negotiate bonds and secure them by a mortgage on its property, real and personal, and its franchises, in violation of the plaintiff's rights, and tending to render any judgment the plaintiff may obtain in this action ineffectual.

That a copy of this order be served at least five days before the 8th day of December, 1880, personally upon the president, secretary, treasurer, a director, or the managing agent of the said The Utica, Ithaca and Elmira Railway Company, or upon any or either of them, and by mail forthwith upon the attorneys of the said The Utica, Ithaca and Elmira Railway Company, and such service shall be deemed sufficient.

W. MURRAY, *Justice.*

S. H. WILCOX, *Plff's Att'y.*
Savings Bank Building, Ithaca, N. Y.
S. B. ROLFE, *Clerk.*

STATE OF NEW YORK,
Tompkins County, Clerk's Office, ss:

I, Squire B. Rolfe, clerk of said county, do certify that I have compared the foregoing with the original now on file in said office, and do certify that it is a correct transcript therefrom, and of the whole of said original.

In testimony whereof I have hereunto subscribed my name and affixed the official seal of said county, at Ithaca, this 27th day of November, A. D. 1880.

[L. S.] S. B. ROLFE.

21 Supreme Court, Tompkins County.

FRANKLIN C. CORNELL, AS ADMINISTRATOR of the goods, chattels, and credits of Ezra Cornell, deceased,
against
THE UTICA, ITHACA AND ELMIRA RAILROAD Company, The Utica, Ithaca, and Elmira Railway Company, Henry V. Poor, Thomas N. Rooker, William L. Burt, John Greenough, Henry W. Poor, Joseph Rodbourn, Henry Samuel King, Henry Seymour King, and Enos Wilder.

COUNTY OF TOMPKINS, *ss:*

Samuel H. Wilcox, of Ithaca, in said county, being duly sworn, says that he is the attorney for the plaintiff in the above-entitled action; that on the 27th day of November, 1880, an order to show cause was granted in this action, by a special term of this court, held in and for the county of Tompkins, at the court-house in the village of Ithaca, on that day, which order requires the Utica, Ithaca and Elmira Railway Company, one of said defendants, to show cause before an adjourned term of this court, to be held at the chambers of the Hon. Douglass Boardman, one of the justices of this court, in the said village of Ithaca, on the 8th day of December, 1880, why a temporary injunction should not be granted, restraining the Utica, Ithaca, and Elmira Railway Company, its officers, attorneys, and agents, from issuing or negotiating any bonds of the Utica, Ithaca and Elmira Railway Company and from securing the same by
22 mortgage on any of its property or franchises and in the mean time granting until the hearing and decision of such application a preliminary injunction restraining the Utica, Ithaca and Elmira Railway Company from doing any of the acts above named; that said order was duly entered and certified copies thereof, together with a copy of the papers upon which it was granted, were duly served upon the Utica, Ithaca and Elmira Railway Company and upon their attorneys as required by said order; that by stipulation between this deponent and Charles H. Tweed, esq., the attorney for said Utica, Ithaca and Elmira Railway Company, the hearing upon said order to show cause was continued until December 15th, 1880, to which time said adjourned special term was duly adjourned and said injunction continued in full force; that on this day, by further stipulation between Mr. Tweed and this deponent, said hearing was fur-

ther postponed until December 20th, 1880, said injunction remaining in force and said court having been duly adjourned until that day; that said Charles H. Tweed, esq., to-day showed to this deponent the affidavit of George J. Rice, president of the Utica, Ithaca and Elmira Railway Company, sworn to December 3, 1880, stating that he intended to oppose the plaintiff's application for said injunction by means of said affidavit; that said affidavit stated in substance that said Utica, Ithaca and Elmira Railway Company on or about the 1st day of October, 1880, issued bonds to the amount of $600,000, and secured the same by a mortgage upon its property and franchises and that said bonds had been negotiated; that deponent heard Irving G. Vann, esq., one of plaintiff's counsel in this action tell Mr. Tweed, after reading the affidavit of said Rice on this day, that the plaintiff would apply at this special term, now in session in Ithaca, presided over by Mr. Justice Murray, for a second order to show cause containing a preliminary injunction restraining the Utica, Ithaca and Elmira Railway Company from paying any part
23 of the principal or interest of any bonds heretofore issued by the Utica, Ithaca and Elmira Railway Company, and from using or paying over any part of any bonds or the proceeds of any bonds heretofore issued by the Utica, Ithaca and Elmira Railway Company, until the further order of the court; that Mr. Tweed replied, that if the plaintiffs procured such an order to show cause containing such an injunction, he would be glad if the hearing should be made returnable on the 20th inst., the time of hearing upon the first order to show cause; and that the hearing upon both orders could then be adjourned until such time as it would be convenient for both parties to argue the same, and deponent assented to such arrangement; that deponent has examined the records in the office of the clerk of Tompkins County, and has there seen upon record, in the book of mortgages, a mortgage given by the Utica, Ithaca and Elmira Railway Company, dated on or about the 1st day of October, 1880, to John Patton and John B. Dumont, as trustees, to secure the bonds of said railway company to the amount of $600,000, to which record in book 8 of Ithaca mortgages, page 291, reference is hereby made as part of this affidavit; that deponent believes that such mortgage has also been recorded in the office of the county clerk of Chemung, Tioga, and Cortland counties; deponent further says that he is informed and believes that said mortgage was given and said bonds, to the amount of $600,000, were issued secretly and surreptitiously, and that for that purpose the seal of said railway company was taken to Canada, and the bonds there issued out of the jurisdiction of the courts of this State or nation; that deponent refers to the complaint in this action, and to the affidavit of Franklin C. Cornell, sworn to November 24th, 1880, and used upon said former application for an order to show cause as part of this affidavit; and that each and every allegation in said complaint and affidavit he believes to be true; that there is no regular special term of this court to which an application for an injunction can be made on the first day thereof
24 upon the usual notice of eight days, to be held during the next week; that the rights of the plaintiff are so important, and the hazard so great, that deponent asks in his behalf an order to show cause at such adjourned special term, to be held on the 20th inst.; that no other application for an order of this character has been made; that deponent

refers to the undertaking already given in this action for the purpose of procuring an injunction.

S. H. WILCOX.

Subscribed and sworn to before me this 15th day of Dec., 1880.

ABEL BURRITT,
Notary Public.

25 At a special term of the supreme court, held at the court-house in the village of Ithaca, in and for the county of Tompkins, on the 15th day of December, 1880.

Present, Hon. Wm. Murray, P. J.

FRANKLIN C. CORNELL, AS ADMINISTRATOR of the goods, chattels, and credits of Ezra Cornell, deceased,

against

THE UTICA, ITHACA AND ELMIRA RAILROAD Company, The Utica, Ithaca and Elmira Railway Company, Henry V. Poor, Thomas N. Rooker, William L. Burt, John Greenough, Henry W. Poor, Joseph Rodbourn, Henry Samuel King, Henry Seymour King, and Enos Wilder.

Upon all the papers filed or served in this action, including the bond and other papers used upon an application to this court in this action for an order to show cause, with a preliminary injunction on the 27th day of November, 1880, further copies of which need not be served, and upon the affidavit of S. H. Wilcox, esq., dated this day, a copy of which is to be served with a copy of this order, as hereinafter provided, and on motion of Samuel H. Wilcox, plaintiff's attorney, it is—

Ordered, that the defendant The Utica, Ithaca and Elmira Railroad Company show cause before an adjourned special term of this court at the chambers of Hon. Douglass Boardman, one of the justices of this court, in the village of Ithaca, county of Tompkins, and State of New York,
26 on the 20th day of December, 1880, at 10 a. m. of that day, or as soon thereafter as counsel can be heard, why a temporary injunction should not be granted in this action restraining the said defendant The Utica, Ithaca and Elmira Railway Company, its officers, attorneys, and agents, from paying or causing or permitting to be paid any part of either the principal or interest of any bonds heretofore issued or that may hereafter be issued by or on behalf of the said defendant The Utica, Ithaca and Elmira Railway Company, and from furnishing and from permitting to be used any money, property, or assets of the Utica, Ithaca and Elmira Railway Company for that purpose; and from paying out, using, or in any way disposing of any money or other property received or that may hereafter be received by the Utica, Ithaca and Elmira Railway Company from the sale or negotiation or disposition of any bonds heretofore issued, or that may hereafter be issued by the Utica, Ithaca and Elmira Railway Company, and from allowing, consenting to, or permitting any disposition whatsoever of any proceeds or avails of any bonds of the Utica, Ithaca

and Elmira Railway Company heretofore or hereafter issued, until the further order of the court.

And why the temporary injunction already applied for in this action, and referred to in the affidavit of Mr. Wilcox, should not be enlarged and extended accordingly, and why such other and further order or relief should not be granted to the plaintiff as shall be just.

And in the mean time, and until the hearing and decision of the application for an injunction upon the return or hearing of this order to show cause, the said defendant The Utica, Ithaca and Elmira Railway Company, its officers, attorneys, and agents, be, and they are hereby, enjoined and restrained from paying or causing or permitting to be paid any part of either the principal or interest of any bonds heretofore issued or that may hereafter be issued by or on behalf of the said defendant The
27 Utica, Ithaca and Elmira Railway Company, and from furnishing and from permitting to be used any of its money, property, or assets for that purpose; and from paying out, using, or in any way disposing of any money or other property or assets already received or that may hereafter be received by The Utica, Ithaca and Elmira Railroad Company from the sale or negotiation or disposition of any bonds heretofore issued or that may be hereafter issued by the Utica, Ithaca and Elmira Railway Company, and from allowing, consenting to, or permitting any disposition whatever of any proceeds or avails of any bonds of the Utica, Ithaca and Elmira Railway Company heretofore issued or that may be hereafter.

The grounds upon which this preliminary injunction is granted are that the defendant. The Utica, Ithaca and Elmira Railway Company has illegally and without authority issued bonds to the amount of $600,000, and secured them by a first mortgage upon its property and franchises, and has negotiated such bonds in fraud of the plaintiff's rights as the holder of an equitable lien upon the property and franchises of said company superior to that of the holder of any bond issued or mortgage given before the payment and satisfaction of such equitable lien, and that the proceeds of such bonds so issued and negotiated are liable to be used by the said railway company in violation of the rights of the plaintiff, and tending to render any judgment that he may obtain in this action ineffectual; that a copy of this order and of said affidavit of said Samuel H. Wilcox be served within three days from this date personally upon the president, secretary, treasurer, or a director or the managing agent of the Utica, Ithaca and Elmira Railway Company, or upon any or either of them, and by mail forthwith upon the attorney of the Utica, Ithaca, and Elmira Railway Company, and such service shall be deemed sufficient, and the
28 service of all papers heretofore served in this action is hereby dispensed with.

Granted, filed, and entered Dec. 15, 1880.

S. B. ROLFE, *Clerk.*

STATE OF NEW YORK,
Tompkins County, Clerk's Office, ss:

I, Squire B. Rolfe, clerk of said county, do certify that I have compared the foregoing with the original now on file in said office, and do certify that it is a correct transcript therefrom and of the whole of said original.

In testimony whereof I have hereunto subscribed my name and affixed the official seal of said county, at Ithaca, this 15th day of December, A. D. 1880.

[L. S.] E. A. MARSH,
Dept. Clerk.

Supreme court, Tompkins County.

FRANKLIN C. CORNELL, AS ADMINISTRATOR OF the goods, chattels, and credits of Ezra Cornell, deceased,

against

THE UTICA, ITHACA & ELMIRA RAILROAD COMPANY, The Utica, Ithaca & Elmira Railway Company, Henry V. Poor, Thomas N. Rooker, William L. Burt, John Greenough, Henry W. Poor, Joseph Rodbourn, Henry Samuel King, Henry Seymour King, and Enos Wilder.

TOMPKINS COUNTY, *ss:*

Franklin C. Cornell, of the village of Ithaca, in said county, being duly sworn, says: that he is the administrator of the goods, chattels, and credits of Ezra Cornell, deceased, and as such is the plaintiff in the above-entitled action; that annexed hereto, and forming a part of this affidavit, is a copy of the complaint in this action, sworn to by this deponent on the 26th day of June, 1878; that all of the allegations in said complaint contained are true to deponent's knowledge, except those contained in the 18th, 19th, 20th, 24th, and 25th folios thereof, and so much of the 28th folio thereof as commences with the words "which plaintiff" and ends with the words "other claims thereon," and excepting the first four lines of folio 30 thereof, and the last three lines of folio 31 thereof, and all of folio 33 except the last line thereof, and so much of folios 35 and 36 as begins with the words "plaintiff further alleges" and ends with the words "unable to state," and excepting the last three lines of folio 37 and the first three lines of folio 38 thereof; that the allegations of said complaint which are not true to deponent's knowledge, but are alleged to be true on his information and belief, as above stated, relate to other defendants in this action than the defendant Henry Seymour King. Deponent reiterates the allegations in said complaint contained, except the *the* last three lines of folio 37, and to and including the words "old bonds" in folio 38 thereof.

That shortly after the organization of the said defendant The Utica, Ithaca & Elmira Railway Company, as alleged in said complaint, stock to the amount of several hundred thousand dollars of said Utica, Ithaca & Elmira Railway Company was issued to and for the benefit of said firm of Henry S. King & Co., composed of Henry Samuel King and Henry Seymour King, which stock, although wholly owned and controlled by the said firm, was taken in the name of one George J. Rice, as the agent of said firm of Henry S. King & Co.; that subsequently the said Henry Samuel King departed this life, leaving him surviving and as the sole survivor of said firm the said defendant Henry Seymour King, who thenceforward claimed to own and still claims to own the said stock so issued as aforesaid, although the said Rice has had, and now has, the actual custody of the certificates of said stock.

That deponent has recently learned that in violation of plaintiff's rights the said Utica, Ithaca & Elmira Railway Company, which is wholly owned and controlled by the said Henry Seymour King, on or about the 1st day of October, 1880, issued bonds to the amount of six hundred thousand dollars, and secured the same by a mortgage upon its property and franchises, and that said bonds have been negotiated to a certain extent.

Deponent further says, that there is now upon record in the office of the clerk of the county of Tompkins, in the book of mortgages in
31 that office, a mortgage given by the defendant The Utica, Ithaca and Elmira Railway Company, bearing date October 1st, 1880, to John Paton and John B. Dumont, as trustees, to secure the bonds of said Utica, Ithaca and Elmira Railway Company, to the amount of $600,000.00, to which record of book eight of Ithaca mortgages, page 291, reference is hereby made as a part of this affidavit. Deponent further says, that, as he is informed and believes, such mortgage has also been recorded in the office of the county clerks of Chemung, Tioga, and Cortland counties, and that said mortgage was given and said bonds to the amount of $600,000.00 were issued secretly and surreptitiously and illegally, and without adequate authority for that purpose, and that the seal of said Utica, Ithaca and Elmira Railway Company was taken to Canada and the bonds there issued, out of the jurisdiction of the courts of this State and nation, and for the purpose of defrauding the plaintiff.

Deponent further says that said stock of the Utica, Ithaca and Elmira Railway Company, so issued as aforesaid, is about to be delivered by said Rice to said defendant Henry Seymour King, and by him negotiated, so as to get the same in the hands of bona fide purchasers, and that the said Henry Seymour King, who resides in London, England, has recently come to this country, and is now here for that purpose, and that this is done in furtherance of the scheme to defraud the plaintiff, and to consummate and complete the effort to defraud said plaintiff; that if said stock is received and negotiated by the said Henry Seymour King, the rights of the plaintiff will be seriously injured, and the result will tend to render ineffectual any judgment that the plaintiff may recover in this action.

That said Henry Seymour King and said George J. Rice are now in the city of New York together, for the purpose aforesaid, and the said
32 Henry Seymour King intends as soon as he gets possession of said stock to leave this country for England, and to negotiate said stock in that country. That the said Henry Seymour King for a long time led this plaintiff to believe that the said Henry S. King & Co., and the said Henry Seymour King, as survivor and personally, and the said Utica, Ithaca and Elmira Railway Company were ready and willing to carry out the agreement and arrangement mentioned in the complaint in this action, by the issue and delivery to the plaintiff of new bonds, to the amount of old bonds held by the plaintiff, and to which he was entitled; but within the past few months the said Henry Seymour King, as well as said railway company, which is his creature, seem determined to violate said agreement, and not only to refuse to carry it out in any respect, but if possible to so arrange matters that it cannot be carried out, all of which is in violation of the plaintiff's rights respecting the subject of this action; and that the scheme of issuing said bonds was conceived and executed for the purpose

of rendering any judgment that the plaintiff may obtain in this action ineffectual and of no avail.

That two preliminary injunctions have already been granted in this action against the defendant The Utica, Ithaca and Elmira Railway Company, restraining it from issuing any bonds, or encumbering its property by any mortgage, and also from paying any part of the principal or interest of said bonds so issued as aforesaid; and that each of said injunctions contained the usual order to show cause, returnable at an adjourned special term of this court, to be held in and for the county of Tompkins, and that the hearing upon said orders to show cause has been continued for the accommodation of the counsel of the said defendant The Utica, Ithaca and Elmira Railway Company, who is also the counsel for the said defendant Henry Seymour King, until the 18th day of March, 1881, to which time said adjourned special term has been or is to be ad-
33 journed; that deponent desires a preliminary injunction pursuant to the provisions of the code of civil procedure, restraining the said defendant Henry Seymour King, both personally and as the survivor of the firm of Henry S. King & Co., from selling, transferring, or in any way disposing of any of said bonds which may now be in his possession or under his control, and from receiving, accepting, or taking into his possession, from any source whatever, any of said stock, and from negotiating, transferring, or in any way disposing of any of said stock that may now be in his possession or under his control, or that shall at any time hereafter come into his possession or under his control.

Deponent hereby refers to the affidavits heretofore used and served in this action, for the purpose of obtaining said two preliminary injunctions now in force, as a part of this affidavit. That there is no regular special term of this court to which an application for an injunction can be made, on the first day thereof, upon the usual notice of eight days, to be held during the next week; that the rights of the plaintiff are so important and the hazard so great, that he asks an order to show cause, returnable at said adjourned special term, to be held in March, as aforesaid; that no other application for an order of this character has been made.

FRANKLIN C. CORNELL.

Subscribed and sworn to before me this 17th Feb., 1881.

M. VAN CLEEF,
Notary Public.

34 Supreme court, Tompkins County.

FRANKLIN C. CORNELL, AS ADMINISTRATOR OF the goods, chattels, and credits of Ezra Cornell, deceased,

ag'st

THE UTICA, ITHACA AND ELMIRA RAILROAD Company, The Utica, Ithaca and Elmira Railway Company, Henry V. Poor, Thomas N. Rooker, William L. Burt, John Greenough, Henry W. Poor, Joseph Rodbourn, Henry Samuel King, Henry Seymour King, and Enos Wilder.

Upon all the papers filed or served in this action, including the various

papers used upon the granting of two previous preliminary injunctions in this action, further copies of which need not be served; and upon the affidavit of Franklin C. Cornell, dated the 17th day of February, 1881, a copy of which is to be served, with a copy of this order, as hereinafter provided; and on motion of Samuel H. Wilcox, plaintiff's attorney, it is ordered:

That the defendant Henry Seymour King, both personally and as survivor of the firm of Henry S. King & Co., show cause before an adjourned special term of this court, at the chamber of Hon. Douglas Boardman, one of the justices of this court, in the village of Ithaca, county of Tompkins, and State of New York, on the 18th day of March,
35 1881, at 10 a. m. of that day, or as soon thereafter as counsel can be heard, why a temporary injunction should not be granted in this action restraining the said defendant Henry Seymour King, both individually and as survivor of the firm of Henry S. King & Co., his attorneys, counselors, employés, and agents, and especially his agent the said George J. Rice, from selling, transferring, or in any way disposing of any bonds, or obligations in the form of railroad bonds, of the said defendant The Utica, Ithaca and Elmira Railway Company that may now be in his possession or under his control; and from receiving, accepting, or taking into his possession from the said George J. Rice, or from any source whatever, any of the stock of the said defendant The Utica, Ithaca and Elmira Railway Company, and from negotiating, transferring, or in any way disposing of any of said stock that may now be in his possession or under his control or that shall at any time hereafter come into his possession or under his control.

And in the mean time, and until the hearing and decision of the application for an injunction upon the return and hearing of this order to show cause, the said defendant Henry Seymour King, both individually and as survivor of the firm of Henry S. King & Co., his attorneys, counselors, employés, and agents, and especially his agent the said George J. Rice, be, and they are hereby, enjoined and restrained from selling, transferring, or in any way disposing of any bonds or obligations in the form of railroad bonds of the said defendant The Utica, Ithaca and Elmira Railway Company that may now be in the possession of or under the control of the said defendant Henry Seymour King, either as an individual or as survivor of the firm of Henry S. King & Co., or in possession of or under the control of any attorney, counselor, employé, or agent of said Henry Seymour King as an individual or as such survivor, and from receiving, accepting, or taking into his possession from the said
36 George J. Rice, or from any source whatever, any of the stock of the said defendant The Utica, Ithaca and Elmira Railway Company, and from negotiating, transferring, or in any way disposing of any of said stock that may now be in the possession or under the control of the said Henry Seymour King, individually or as such survivor, or that shall at any time hereafter come into his possession or under his control of the said Henry Seymour King, either individually or as such survivor.

The grounds upon which this preliminary injunction is granted are that the defendant The Utica, Ithaca and Elmira Railway Company has illegally and without authority issued bonds to the amount of $600,000.00 and secured them by a first mortgage upon its property and franchises, and

has negotiated, or has attempted so to do, such bonds in fraud of the plaintiff's rights, as the holder of an equitable lien upon the property and franchises of said company, prior and superior to that of the holder of any bond issued or mortgage given before the payment and satisfaction of such equitable lien; and that the said defendant Henry Seymour King has received some of said bonds, and that the said Henry Seymour King is now in this country to receive a large amount of stock issued by said railway company, which he intends to negotiate and dispose of in fraud of plaintiff's rights, as well as to the great injury of such persons as might be induced to purchase such stock from him, and generally, upon the ground that the acts of the said defendant Henry Seymour King in relation to the said bonds and stock are in violation of the rights of the plaintiff and tend to render any judgment that he may obtain in this action ineffectual.

Let a copy of this order, and of said affidavit of said Franklin C. Cornell, be served by mail upon the attorneys for the said defendant
37 Henry Seymour King, and such service shall be deemed sufficient, and the service of all papers heretofore served in this action is hereby dispensed with.

D. BOARDMAN,
Justice Supreme Court.

38 Supreme court.

FRANKLIN C. CORNELL, AS ADMINISTRATOR OF the goods, chattels, and credits of Ezra Cornell, deceased,

ag'st

THE UTICA, ITHACA & ELMIRA RAILROAD Company, The Utica, Ithaca & Elmira Railway Company et al.

TOMPKINS COUNTY, *ss:*

Franklin C. Cornell, the plaintiff named in the above action, being duly sworn, says, that on the evening of April 28th, 1878, this deponent was at the St. James Hotel, in New York City, in company with Joseph Rodbourn, Henry Seymour King, and George J. Rice; that they dined in company at said hotel, and spent the evening together; that during said evening this deponent had a conversation with said defendant Henry Seymour King in reference to the foreclosure and sale of the Utica, Ithaca & Elmira Railroad, which was to take place the next day; that during said conversation said King told this deponent that the agreement which he had made with George J. Rice was all right, and that if he, King, bid the road in upon the sale the next day, that he would give this deponent new bonds for the old bonds which this deponent held, or was entitled to, against the Utica, Ithaca & Elmira Railroad; and this deponent further says that no notice was ever given to him by any one that Mr. Rice had no authority to make any agreement with him on behalf of said King; that no one ever offered to adjourn the sale of said road upon de-
39 ponent's account, or any other account, so far as deponent knows.

Deponent further says, that while Mr. Fairchild may have stated at the sale that purchasers must look out for their own interests, he has no

recollection of hearing him say so; that deponent has not seen, nor has he access to the affidavits read by the defendants on the motion this day, and does not wish to be understood as assenting to such parts thereof as are not above denied.

Deponent further says, that neither Rice nor King notified deponent at any time prior to said sale that he must protect his interests upon said sale, nor that in substance or effect; and at the sale deponent had no idea but that the agreement alleged in the complaint as having been made between him and King & Co. would be fully carried out, and he confidently believed that the purchase at such sale was just as much in his interest, in proportion to his rights to old bonds, as it was in the interest of King & Co.

FRANKLIN C. CORNELL.

Subscribed and sworn to before me this 18th March, 1881.

M. VAN CLEEF,
Notary Public.

40 Supreme Court.

FRANKLIN C. CORNELL, AS ADMINISTRATOR OF the goods, chattels, and credits of Ezra Cornell, deceased,

ag'st

THE UTICA, ITHACA AND ELMIRA RAILROAD Company, The Utica, Ithaca and Elmira Railway Company et al.

CHEMUNG COUNTY, *ss:*

Joseph Rodbourn, of Breesport, in said county, being duly sworn, says:

That on the evening before the foreclosure and sale of the Utica, Ithaca and Elmira Railroad, he was present at the St. James Hotel in New York, in company with Henry Seymour King, George J. Rice, and Franklin C. Cornell; that they dined together; that during the evening they had conversations together in reference to the affairs of the said Utica, Ithaca and Elmira Railroad Company, and about the sale which was to take place the next day; that the said Henry Seymour King, during said conversation, told this deponent and said Franklin C. Cornell that the agreements which Mr. George J. Rice had made with this deponent and with said Franklin C. Cornell were all right, and that if they permitted him to bid the road in, and if he did bid the road in for the sum of $50,000.00 that he would settle with this deponent and said Franklin C. Cornell, and give them new bonds of the new organization of the road for the old bonds which they then held upon the old Utica, Ithica and Elmira Railroad, bond for bond; and this deponent further says that at the office of Henry V. Poor & Co., in New York, on the morning of the day before the sale,

41 Mr. George J. Rice declared to those present that when the road was sold all persons must protect their own interests; but this deponent says that it was well understood by said Rice and this defendant, Henry Seymour King, that said notice was not to apply to this deponent nor to said Franklin C. Cornell, and that it was after this notice was given

in a public manner in said Poor & Co's. office that said King declared to this deponent and to said Cornell that the agreements made by Rice with them were all right, and that if they refrained from bidding at the sale they should have new bonds for old; and it was also understood by said Rice and King that the notice given by the referee on the day of sale was not to apply to this deponent nor to said Franklin C. Cornell.

JOSEPH RODBOURN.

Sworn to before me this 19th day of March, 1881.
[L. S.] H. C. STONE,
Notary Public.

42 Supreme court, Tompkins County.

FRANKLIN C. CORNELL, AS ADMINISTRATOR OF the goods, chattels, and credits of Ezra Cornell, deceased,
against
THE UTICA, ITHACA, AND ELMIRA RAILROAD Company, The Utica, Ithaca and Elmira Railway Company, Henry V. Poor, Thomas N. Rooker, William L. Burt, John Greenough, Henry W. Poor, Joseph Rodbourn, Henry Samuel King, Henry Seymour King, and Enos Wilder.

ITHACA, *November* 24, 1880.

Whereas the plaintiff is about to apply for an injunction restraining the above named The Utica, Ithaca and Elmira Railway Company, one of the defendants in the above-entitled action, its officers, attorneys, and agents from issuing or negotiating any bonds of the Utica, Ithaca and Elmira Railway Campany and from securing the same by a mortgage upon any of its property, real or personal, or upon its franchises until the further order of the court:

Now, therefore, we, Horace I. Smith and Oristus H. Gregory, both of Ithaca, Tompkins County, New York, do hereby jointly and severally undertake to and with the said The Utica, Ithaca and Elmira Railway Company pursuant to the statute that the said plaintiff will pay to the said The Utica, Ithaca and Elmira Railway Company such damages, not exceeding the sum of five hundred dollars, as the said The Utica, Ithaca
43 and Elmira Railway Company may sustain by reason of the injunction, if the court shall finally decide that the plaintiff is not entitled thereto, and the damages may be ascertained by a reference or otherwise as the court may direct.

HORACE I. SMITH. [L. S.]
O. H. GREGORY. [L. S.]

TOMPKINS COUNTY, *ss:*

Horace I. Smith and Oristus H. Gregory, above named, being duly sworn, say, each for himself, that he is a resident of the State of New York, as mentioned in the above undertaking, and a freeholder therein,

and worth double the sum specified in the said undertaking over all his debts and liabilities, and exclusive of property exempt from execution.

HORACE I. SMITH.
O. H. GREGORY.

Sworn to before me this 25th day of November, 1880.

M. VAN CLEEF,
Notary Public.

TOMPKINS COUNTY, *ss:*

I certify that on this 25th day of November, 1880, Horace I. Smith and Oristus A. Gregory, above named, to me known to be the persons described in and who executed the above, personally appeared before me and severally acknowledged that they executed the above undertaking as their own free act, for the uses and purposes therein mentioned.

M. VAN CLEEF,
Notary Public.

I approve the within undertaking and the sufficiency of the sureties therein named.

W. MURRAY, *Justice.*

ITHACA, *November 27th*, 1880.

44 STATE OF NEW YORK,
Tompkins County Clerk's Office, ss:

I, Squire B. Rolfe, clerk of said county, do certify that I have compared the foregoing with the original now on file in said office, and do certify that it is a correct transcript therefrom, and of the whole of said original.

In testimony whereof, I have hereunto subscribed my name, and affixed the official seal of said county, at Ithaca, this 25th day of April, A. D. 1881.

S. B. ROLFE, *Clerk.*

45 Supreme court, Tompkins County.

FRANKLIN C. CORNELL, AS ADMINISTRATOR OF the goods, chattels, and credits of Ezra Cornell, deceased,

against

THE UTICA, ITHACA AND ELMIRA RAILROAD Company, the Utica, Ithaca and Elmira Railway Company, Henry V. Poor, Thomas N. Rooker, William L. Burt, John Greenough, Henry W. Poor, Joseph Rodbourn, Henry Samuel King, Henry Seymour King, and Enos Wilder.

ITHACA, *February* 17, 1881.

Whereas the plaintiff is about to apply for an injunction restraining the above-named Henry Seymour King, both personally and as the survivor of the firm of Henry S. King & Co., his attorneys, counsellors, em-

ployees, and agents, and especially his agent the said George J. Rice, from selling, transferring, or in any way disposing of any bonds or obligations in the form of railroad bonds of the said defendant The Utica, Ithaca and Elmira Railway Company, that may be now in his possession or in his control, and from receiving, accepting, or taking into his possession from the said George J. Rice, or from any source whatever, any of the stock of the said defendant, The Utica, Ithaca and Elmira Railway Company, and from negotiating or in any way transferring or disposing of any of said stock that may be now in his possession or under his
46 control, or that shall hereafter come into his possession or under his control:

Now, therefore, we, Franklin C. Cornell, Oristus H. Gregory, and Abel Burritt, both of Ithaca, Tompkins County, New York, do hereby jointly and severally undertake to and with the said Henry S. King, pursuant to the statute, that the said plaintiff will pay to the said Henry S. King such damages, not exceeding the sum of five hundred dollars, as the said Henry S. King may sustain by reason of the injunction, if the court shall finally decide that the plaintiff is not entitled thereto, and the damages may be ascertained by a reference or otherwise as the court may direct.

FRANKLIN C. CORNELL. [L. S.]
O. H. GREGORY. [L. S.]
ABEL BURRITT. [L. S.]

TOMPKINS COUNTY, *ss:*

Oristus H. Gregory and Abel Burritt, above named, being duly sworn, say, each for himself, that he is a resident of the State of New York, as mentioned in the above undertaking, and a freeholder therein, and worth double the sum specified in the said undertaking over all his debts and liabilities, and exclusive of property exempt from execution.

O. H. GREGORY.
ABEL BURRITT.

Sworn to before me this 17th February, 1881.

M. VAN CLEEF,
Notary Public.

47 TOMPKINS COUNTY, *ss:*

I certify that on this 17 day of Feb., 1881, Franklin C. Cornell, O. H. Gregory, and Abel Burritt, above named, to me known to be the persons described in and who executed the above undertaking, personally appeared before me and severally acknowledged that they executed the same as their free act and deed for the uses and purposes therein mentioned.

M. VAN CLEEF,
Notary Public.

I approve the within undertaking and the sufficiency of the sureties therein named.

D. BOARDMAN,
Justice Supreme Court.

ITHACA, *Feb'y* 17, 1881.

STATE OF NEW YORK,
Tompkins County Clerk's Office, ss:

I, Squire B. Rolfe, clerk of said county, do certify that I have compared the foregoing with the original now on file in said office, and do certify that it is a correct transcript therefrom, and of the whole of said original.

In testimony whereof I have hereunto subscribed my name and affixed the official seal of said county, at Ithaca, this 25th day of April, A. D. 1881.

[L. S.] S. B. ROLFE, *Clerk.*

48, 49 Supreme Court, Tompkins County.

FRANKLIN C. CORNELL, AS ADMINISTRATOR of the goods, chattels, and credits of Ezra Cornell, deceased,
against
HENRY SEYMOUR KING, IMPLEADED WITH THE Utica, Ithaca and Elmira Railroad Company and others.

Henry Seymour King, one of the defendants in the above-entitled action, appearing therein by Evarts, Southmayd & Choate, his attorneys, answers the complaint of the plaintiff therein as follows:

First. He admits and avers, upon information and belief, that prior to the twenty-ninth day of October, 1874, a line of railroad was in process of construction from Horseheads, but not from Elmira, in the county of Chemung, to Cortland, in the county of Cortland, and passing through portions of the counties of Tioga and Tompkins; and that, from the time of the incorporation of the Utica, Ithaca & Elmira Railroad Com-
50 pany, on or about the twenty-fifth day of October, 1871, the defendant William L. Burt was the president of and an active manager and agent for and on behalf of the said company, and continued so to be until about the month of June, 1876; and that, subsequent to the time of its incorporation, as aforesaid, and prior to the said twenty-ninth day of October, 1874, the said Utica, Ithaca & Elmira Railroad Company was the company engaged in the construction of the line of railroad above referred to; but he avers, upon information and belief, that it was not directly engaged in such construction, but only through and by means of a contractor or contractors, who contracted with such company for the construction of such railroad; and, upon information and belief, he admits and avers that, on the said twenty-ninth day of October, 1874, said railroad was incomplete, and the contractor therefor (who was then Ezra Cornell in the complaint and hereinafter mentioned) needed and required large sums of money to finish the same.

He admits and avers, upon information and belief, that prior to October, 1874, the said Ezra Cornell, then of Ithaca, New York, but who has since deceased, had been engaged in the construction of said road, as a contractor, for the building of the same, and, as such contractor, had paid out large sums of money and incurred considerable liabilities; but, upon information and belief, he avers that, for a large portion, if not the whole

of such sums of money and such liabilities, the said Ezra Cornell had received and then held and owned (subject to hypothecation, however, as hereinafter stated) bonds of said company, issued under and purporting to be secured by a first mortgage upon its real estate, equipment, and appurtenances, but he has no knowledge nor information sufficient to form a belief that the company was indebted to said Ezra Cornell, for or in respect of such sums of money or such liabilities, or any part thereof; but, upon information and belief, he avers that the greater part, if not the whole of any formerly existing indebtedness or liability of said company to said
51 Ezra Cornell had been paid and discharged by said company by the delivery to said Cornell of such bonds of said company and certain of the stock thereof, and the said Ezra Cornell had thereby become, and on the 29th day of October, 1874, was the owner and holder of such bonds of said company to a large amount, subject only to the rights of the pledgees thereof, under the hypothecatian of such bonds hereinafter mentioned.

He admits and avers, upon information and belief, that the said Ezra Cornell, in order to carry on the construction of such railroad under his contract with the said company therefor, and, perhaps, also, in order to obtain money for other purposes, had hypothecated such bonds of the said company for large amounts of money borrowed from divers banks and bankers thereon by the said Cornell, for which amounts of money the said Cornell was personally liable, and that in October, 1874, the said Cornell was unable to borrow further moneys upon the said bonds, or to make sale of such bonds at any considerable price, to any American bankers or investors, and was unable, from his own means and resources to furnish other moneys to carry on the construction of such railroad under his contract with said company for the construction thereof, and was deeply embarrassed by the large loans which he had already procured upon such bonds, which loans he was unable then to pay, and by the obligations which he had assumed under his agreement with said company for the construction of its railroad for its stock and bonds; and, upon information and belief, he admits and avers that the said Cornell was unable to make any further advances or pay out any further sums of money until the bonds of said company could, in some manner, be sold and turned into money.

He admits and avers, upon information and belief, that the defendant Joseph Rodbourn had also, to a considerable extent, aided and assisted in the construction of the said railroad, and that in so doing he had advanced considerable sums of money; but he avers, upon information and
52 belief, that such aid and assistance was rendered by the said Rodbourn to the said Ezra Cornell, as a contractor for the construction of such railroad, and upon the employment of said Ezra Cornell, and that such advances were made by the said Rodbourn to the said Cornell, and that the said Ezra Cornell was personally indebted to the said Rodbourn for the value of all such aid and assistance as may have been rendered by the said Rodbourn in or about or in connection with the construction of such railroad, and any and all sums of money which had been advanced by the said Rodbourn in or about or in connection with the same; and, upon information and belief, he denies that the said railroad company, in October, 1874, had become or remained indebted to the said Rodbourn in any amount whatsoever, but, upon information and belief, he avers that the

fact was that the said Cornell, having contracted to construct such railroad, employed the said Rodbourn as a subcontractor under him, and the said Ezra Cornell was liable to said Rodbourn for all acts and things done and all moneys advanced by him in or about or in connection with the construction thereof.

And the said defendant further avers that, as he is informed and believes, the said Ezra Cornell was, prior to and in the month of, October, 1874, indebted to the defendant William L. Burt for advances which had been made by the said defendant Burt and by the defendant Enos Wilder, through the said Burt, to the said Cornell, for which the said Cornell had become and was personally indebted to the said Burt and the said Wilder.

Second. This defendant is informed and believes that, on or about the twenty-ninth day of October, 1874, some contract was made and entered into by and between the said Ezra Cornell and the said William L. Burt and Joseph Rodbourn and Henry V. Poor, Thomas N. Rooker, and the Utica, Ithaca & Elmira Railroad Company, authorizing the sale in England by one John Greenough, for the other parties to such contract,
53 but particularly for the said Ezra Cornell, of the bonds of the last-named railroad company, but he has no knowledge nor information sufficient to form a belief of the precise terms and conditions of such contract, and for the contents, purport, and effect thereof prays leave to refer to the original of such contract when the same shall be produced, and denies each and every allegation in the complaint herein contained in respect to the contents, purport, and effect of such contract, except so far as, upon an inspection thereof, such allegations may be found to be correct and true.

He admits and avers, upon information and belief, that said Ezra Cornell died on or about the ninth day of December, 1874, leaving no will, and the said plaintiff was duly appointed by the surrogate of Tompkins County, who had jurisdiction for that purpose, administrator of the goods, chattels, and credits of said Ezra Cornell, deceased, but, except as aforesaid, he has no knowledge nor information sufficient to form a belief of the allegations contained in folios 18, 19, 20, or 21 of said complaint, or any of them, and he therefore controverts such allegations, and each of them.

He admits and avers that soon after the execution of said contract the parties thereto entered upon the performance thereof, and that a large amount of said bonds were sent to England for the purpose of being sold and delivered to purchasers there, and the said John Greenough began the work of selling the same, and from time to time sold large quantities of the same, and he avers that such sales were made by the said Greenough under the said agreement and by virtue of the authority conferred upon him thereby.

He admits and avers that not less than nine hundred and forty-six of said bonds were sold by the said Greenough under said contract, and, upon information and belief, he avers that the amount of such bonds so sold under the said contract by the said Greenough was not less than ten hundred and seventy-three of such bonds, but this defendant does not know with entire accuracy and certainty what quantity were sold by him, nor the precise purchase price of all the bonds so sold; but he avers that of such bonds
54 there were sold to this defendant's firm, as hereinafter alleged, not

less than eight hundred and thirty-two of such bonds, for a sum not less than one hundred and seventeen thousand eight hundred pounds sterling.

He admits, upon information and belief, that bonds for the amount, taken at their par or face value, of twenty thousand dollars were delivered to said Rodbourn at some time after the date of said contract; but upon and for what, if any, consideration such bonds were so delivered to said Rodbourn this defendant has no knowledge nor information sufficient to form a belief.

He admits and avers, upon information and belief, that the defendant Henry W. Poor, who is the son of the defendant Henry V. Poor, acted as the agent of Henry V. Poor and Thomas N. Rooker, as trustees, and of the said Henry V. Poor in respect to the sale of the said bonds by the said Greenough in England, and, to a considerable extent, took upon himself the active management in America of the affairs of said trust, and of the acts and things done in America to promote a sale of such bonds in England; and he avers, upon information and belief, that such action of the said Henry W. Poor was well known and assented to by the said Ezra Cornell and the plaintiff, as his personal representative, after his decease, and by the other parties to the agreement above mentioned.

He admits and avers, that out of the proceeds of the bonds sold by the said Greenough under the said contract the sum of thirty-four thousand six hundred and six dollars was paid upon interest coupons to prevent a default on said bonds, and, upon information and belief, he admits that the same was allowed by the plaintiff and said Rodbourn to be so paid, and, upon information and belief, this defendant avers that there was paid, and was allowed by the said plaintiff and said Rodbourn to be paid out of the proceeds of the sales of such bonds through the said Greenough in England, in order to prevent a default on said
55 bonds, amounts sufficient to provide and pay the interest coupons falling due on the first day of July, 1875, and on the first day of January, 1876, and on the first day of July, 1876, and on the first day of January, 1877, upon such of said bonds as had been sold in England or were outstanding in the hands of parties other than the parties who had executed the said agreement or were engaged in carrying out the same, and that no interest was ever otherwise paid upon said bonds, and he avers that when such payments on account of interest were made out of the proceeds of such bonds in such a way as that that fact came to the knowledge of this defendant, the said Greenough stated to this defendant that the amount of such interest had been earned by the said railroad, and stood to its credit in America, but that such payments were made out of the proceeds of such bonds only for the purpose of saving the cost of exchange upon the transmission of the proceeds of such bonds to America, and the transmission of such earnings of the said railroad to England, but except as aforesaid he has no knowledge nor information sufficient to form a belief of the allegations contained in folios 22 to 31, inclusive, of said complaint or any of *of* them, and he therefore controverts such allegations and each of them.

Third. He admits that at the date of the advertisement of sale under the foreclosure proceedings referred to in folio 32 of said complaint, the firm of Henry S. King & Co. (which then consisted of Henry Samuel

King and of this defendant, both of whom resided in England, and of which firm this defendant is now the survivor, the said Henry Samuel King having died on the 17th day of November, 1878) held partly for their own account, as owners, and partly for account of other persons owning the same, such first-mortgage bonds of the said Utica, Ithaca and Elmira Railroad Company to the amount in the aggregate of upwards of eight hundred and thirty thousand dollars, and that the same constituted a large part of the bonds of said company which had been sold in
56 England, and that his said firm and the other owners of bonds which were held by his said firm for their account, as hereinbefore stated, constituted a large part of the bondholders interested in the foreclosure of the mortgage securing such first-mortgage bonds, and in the results thereof, but he has no knowledge nor information sufficient to form a belief that the plaintiff or said Burt in the complaint mentioned were actual bondholders at that time, or had any lawful interest in the foreclosure of said mortgage or the results thereof, and he therefore controverts the allegations in that behalf in said complaint contained, and he expressly avers that said Henry S. King & Co. did not hold any such bonds for or on account of either the plaintiff or the said Burt, and that neither the said plaintiff nor the said Burt was in any wise interested beneficially or otherwise in the bonds so held by the firm of Henry S. King & Co., as aforesaid, or any of them.

Fourth. He admits that at the sale in the month of April, 1878, under the judgment in the foreclosure proceedings above referred to, the property covered by the mortgage in said judgment mentioned was struck off to Daniel A. Lindley and Edward K. Goodnow, as purchasers thereof, and that in making such purchase they acted under the instructions of the said firm of Henry S. King & Co., and that a referee's deed of the property so sold at said sale was a few days thereafter duly executed and delivered to said purchasers, and that thereafter such proceedings were had that a new company was formed to own and operate the railroad described in said deed, and that the name and title of said company was the Utica, Ithaca and Elmira Railway Company, and that the same is duly organized and incorporated, and is named as one of the defendants in this action, but, except as hereinbefore expressly admitted, he denies the allegations contained in folios 33, 34, 35, 36, and 37 of said complaint, and each of them, and the allegations contained in folio 38 of said complaint down to and including the words "in place and stead of said old bonds."

57 Fifth. He admits that if said Henry S. King & Co. had made any such agreement or arrangement as is in said complaint alleged (which, however, he denies), they and the said Utica, Ithaca and Elmira Railway Company would be unable to make any delivery of any new bonds thereunder until the ownership of the old bonds had been settled, and until the respective rights of the parties claiming such old bonds, if any rights they had therein, had been fully adjudged and determined, but he avers that the rights of the plaintiff and the said Burt and others in, to, and in respect to such old bonds, if any rights they have therein, have never been in any wise adjudged or determined, nor have their claims to the ownership of such bonds been in any wise settled. He admits that the sale in England of bonds of said Utica, Ithaca and Elmira Railroad Company, except, perhaps, at entirely nominal prices, has utterly ceased and ended, and that no market,

except, perhaps, at such entirely nominal prices, remains there for such bonds, and that the said John Greenough has ceased all efforts to sell the same, but he has no knowledge nor information sufficient to form a belief as to what rights said Greenough may have, or claim, or pretend to have in respect to such bonds, or the sale thereof under the contract in the 38th folio of said complaint referred to, or otherwise howsoever.

Sixth. He avers that, prior to the time of the sale of the mortgaged premises under the foreclosure proceedings hereinbefore referred to, this defendant, on behalf of his said firm of Henry S. King & Co., caused the said plaintiff to be expressly notified and warned that, in case the said Henry S. King & Co. should purchase, either directly or indirectly, or should direct the purchase of the said mortgaged premises, or any part thereof, at such sale, any such purchase would be for their own account and subject to their own directions, and the property purchased would be held and disposed of as they should see fit, without any trust or obli-
58 gation of any kind in favor of the plaintiff, or any other person or party in respect thereto, or in respect to any acts or proceedings of any new company which might be thereafter formed to own and operate the same, and that the plaintiff must himself protect at such sale any interest which he had or claimed to have in, to, or in respect to the mortgaged premises, or any part thereof, and the attorney for the plaintiff in such foreclosure suit expressly offered to the plaintiff herein an adjournment of the sale of said mortgaged premises under the judgment in such foreclosure suit from the time at which such sale had been advertised if he desired such adjournment in order to enable him to make any further arrangements in respect to the protection of his interests or alleged interests in, to, or in respect to such premises, but the said plaintiff expressly stated that he desired no adjournment of said sale for any such purpose, and thereupon after the express notification and warning so given by and on behalf of this defendant to the plaintiff, and after the offer of adjournment so made to the plaintiff and by reason of the acts and proceedings of the said plaintiff in respect to such notification and such offer, and his subsequent attendance at and assent to such sale, and the subsequent confirmation thereof by the court, any claims which the plaintiff ever had (if any such there ever were) in respect to such sale or purchase, or in respect of any acts or things to be done by any company which might be thereafter organized to own the property so sold, wholly ceased and determined.

Seventh. He avers that the said plaintiff has not, nor has the said Burt or Rodbourn, ever tendered or offered to pay to said Henry S. King & Co., or to this defendant, a ratable or any proportion of the expenses of the purchase of the said mortgaged premises or connected therewith, or of the expense of the organization, equipment, and operation of the said Utica, Ithaca and Elmira Railway Company, which expenses to the amount of one hundred and fifty thousand dollars (including the amount of fifty thou-
sand dollars which was paid by this defendant's said firm through
59 the purchasers at such sale as the purchase price of the mortgaged premises under such foreclosure sale thereof) have been already paid by said Henry S. King & Co., or by this defendant as survivor of said firm, or ever tendered or offered to deliver to said Henry S. King & Co. or to this defendant any bonds of said Utica, Ithaca and Elmira Railroad Company for exchange for bonds of such Utica, Ithaca and Elmira

Railway Company, or for any other purpose whatsoever, and he avers that they had but very few, if any, of such bonds which they could have so tendered even if they had seen fit to tender the same.

Eighth. He denies upon information and belief that there was ever any valid, lawful, or sufficient consideration for any such alleged or pretended agreement or arrangement as is referred to in folios 33 to 38 of said complaint, or that any such alleged or pretended agreement or arrangement or any note or memorandum of any such alleged or pretended agreement or arrangement in writing subscribed by or on behalf of the defendants said firm of Henry S. King & Co., or this defendant or any party to be charged therewith, was ever in any wise made or executed in favor of or delivered to the said Ezra Cornell or the plaintiff, and he avers that any such alleged or pretended agreement or arrangement would be wholly void under the general rules of law applicable to such cases, and also by reason of the statute of the State of New York commonly called the "Statute of Frauds."

Ninth. The defendant, further answering, respectfully submits to the court whether the defendant, The Utica, Ithaca & Elmira Railway Company has any right, under the laws of the State of New York, to execute or deliver any bond or other similar obligation for or in respect of any formerly existing bonds or obligations of the Utica, Ithaca & Elmira Railroad Company, or whether the issue of any such bonds or other obligations by the said Utica, Ithaca & Elmira Railway Company would be unauthorized and contrary to law and invalid.

60 Tenth. And the said defendant further answering the said complaint, and by way of counterclaim thereto, alleges that the said firm of Henry S. King & Co., at all times hereinafter mentioned, down to the 17th day of November, 1878, consisted of Henry Samuel King and this defendant; that on the said 17th day of November, 1878, the said Henry Samuel King died, leaving this defendant the sole surviving member of the said firm; and that after the death of the said Henry Samuel King all the assets of the said firm vested in and became the property of this defendant, who is still the owner of the same.

He avers, upon information and belief, that prior to the 29th day of October, 1874, a line of railroad was in process of construction from Horseheads, but not from Elmira, in the county of Chemung, to Cortland, in the county of Cortland, and passing through portions of the counties of Tioga and Tompkins, and that from the time of the incorporation of the Utica, Ithaca and Elmira Railroad Company, on or about the 25th day of October, 1871, the defendant William L. Burt was the president of and an active manager and agent for and on behalf of the said company, and continued so to be until about the month of June, 1876; and that subsequent to the time of its incorporation as aforesaid, and prior to the said 29th day of October, 1874, the said Utica, Ithaca and Elmira Railroad Company was the company engaged in the construction of the line of railroad above referred to, but he avers upon information and belief that it was not directly engaged in such construction, but only through and by means of a contractor of contractors, who contracted with such company for the construction of such railroad, and, upon information and belief, he avers that on the said 29th day of October, 1874, said railroad was in complete, and the contractor therefor (who was then Ezra Cornell, in the com-

plaint and hereinafter mentioned) needed and required large sums of money to finish the same.

He avers, upon information and belief, that prior to October,
61 1874, the said Ezra Cornell, then of Ithaca, New York, but who has since deceased, had been engaged in the construction of said road as a contractor for the building of the same, and as such contractor had paid out large sums of money and incurred considerable liabilities; and that for a large portion, if not the whole, of such sums of money and such liabilities, the said Ezra Cornell had received andthen held and owned (subject to hypothecation, however, as hereinafter stated) bonds of said company issued under and purporting to be secured by a first mortgage upon its real estate, equipments, and appurtenances; and, upon information and belief, he avers that the greater part, if not the whole, of any formerly existing indebtedness or liability of said company to said Ezra Cornell had been paid and discharged by said company by the delivery to said Cornell of such bonds of said company and certain of the stock thereof, and the said Ezra Cornell had thereby become, and on the 29th day of October, 1874, was the owner and holder of such bonds of said company to a large amount, subject only to the rights of the pledgees thereof under the hypothecation of such bonds hereinafter mentioned.

He avers, upon information and belief, that the said Ezra Cornell, in order to carry on the construction of such railroad under his contract with the said company therefor, and perhaps also in order to obtain money for other purposes, had hypothecated such bonds of the said company for large amounts of money borrowed from divers banks and bankers thereon by the said Cornell, for which amounts of money the said Cornell was personally liable, and that in October, 1874, the said Cornell was unable to borrow further moneys upon the said bonds, or to make sale of such bonds at any considerable price to any American bankers or investors, and was unable from his own means and resources to furnish other moneys to carry on the construction of such railroad under his contract with said company for the construction thereof, and was deeply embarrassed by the large loans which he had already procured upon such bonds, which loans he
62 was unable then to pay, and by the obligations which he had assumed under his agreement with said company for the construction of its railroad for its stock and bonds; and, upon information and belief, he avers that the said Cornell was unable to make any further advances or pay out any further sums of money until the bonds of said company could in some manner be sold and turned into money.

He avers, upon information and belief, that the defendant Joseph Rodbourn had also, to a considerable extent, aided and assisted in the construction of the said railroad, and that in so doing he had advanced considerable sums of money, and that such aid and assistance was rendered by the said Rodbourn to the said Ezra Cornell, as a contractor for the construction of such railroad, and upon the employment of the said Ezra Cornell, and that such advances were made by the said Rodbourn to the said Cornell, and that the said Ezra Cornell was personally indebted to the said Rodburn for the value of all such aid and assistance as may have been rendered by the said Rodbourn in or about or in connection with the construction of such railroad, and for any and all sums of money which had been advanced by the said Rodbourn in or about or in connection with the same;

and that the said Cornell, having contracted to construct such railroad, employed the said Rodbourn as a subcontrator under him, and the said Ezra Cornell was liable to said Rodbourn for all acts and things done and all moneys advanced by him in or about or in connection with the construction thereof.

And the said defendant further avers that, as he is informed and believes, the said Ezra Cornell was, prior to and in the month of October, 1874, indebted to the defendant William L. Burt for advances which had been made by the said defendant Burt and by the defendant Enos Wilder, through the said Burt, to the said Cornell, for which the said Cornell had become and was personally indebted to the said Burt and the said Wilder.

63 This defendant is informed and believes that on or about the said twenty-ninth day of October, 1874, some contract was made and entered into by and between the said Ezra Cornell and the said William L. Burt, Joseph Rodbourn, and Henry V. Poor, Thomas N. Rooker, and The Utica, Ithaca and Elmira Railroad Company, authorizing the sale in England by one John Greenough for the other parties to such contract, but particularly for the said Ezra Cornell, of the bonds of the last-named railroad company, but he is unable to state the precise terms and conditions of such contract, and for the contents, purport, and effect thereof prays leave to refer to the original of such contract when the same shall be produced.

He avers that by reason of the premises, at the time of the execution of such agreement of the 29th of October, 1874, the said Ezra Cornell, the plaintiff's intestate, as owner of all or nearly all of such bonds, was the person chiefly interested in obtaining, through the said Greenough, the sale in England of the bonds which, under and by virtue of the said agreement, were to be sold by him there.

And this defendant further avers, upon information and belief, that the said Ezra Cornell, as well as the other parties to said contract, were well aware when they entered into the same that no American capitalist or investor, nor any capitalist or investor having an accurate knowledge of the circumstances of the said company and its railroad, could be induced to purchase the said bonds at the prices mentioned in the said agreement, or at any prices approximating thereto, and the intention and expectation of the said parties was that, by the means hereinafter mentioned and referred to, they would be able to induce some English capitalist or capitalists to purchase said bonds at the rates in said agreement prescribed, or at even higher rates, on account of the want of accurate knowledge on the part of such English capitalist or capitalists of the circumstances of the said company and its railroad, and on account of the difficulty of obtaining

64 any information in respect thereto, except such as the parties to said contract might choose to grant.

He avers that soon after the execution of said agreement the parties thereto entered upon the performance thereof, and that a large amount of said bonds were sent to England for the purpose of being sold under said agreement and being delivered to purchasers there, and the said John Greenough began the work of selling the same, and from time to time sold large quantities of the same, and avers that such sales were made by the said

Greenough under the said agreement and by virture of the authority conferred upon him thereby, and as agent for the plaintiff and other parties to the said agreement.

He avers, upon information and belief, that said Ezra Cornell died on or about the ninth day of December, 1874, leaving no will, and the said plaintiff was duly appointed by the surrogate of Tompkins County, who had jurisdiction for that purpose, administrator of the goods, chattels, and credits of said Ezra Cornell, deceased, and that thereafter the said plaintiff succeeded to and assumed and became liable to all the rights, duties, obligations, and liabilities of the said Ezra Cornell under said agreement.

He avers, upon information and belief, that the defendant Henry W. Poor, who is a son of the defendant Henry V. Poor, acted as the agent of Henry V. Poor and Thomas N. Rooker, as trustees, and of the said Henry V. Poor in respect to the sale of the said bonds by the said Greenough in England, and to a considerable extent took upon himself the active management in America of the affairs of said trust, and of the acts and things done in America to promote a sale of such bonds in England, and he avers, upon information and belief, that such action of the said Henry W. Poor was well known and assented to by the plaintiff and by the other parties to the agreement above mentioned.

He avers that the said Greenough, after his arrival in England, represented himself to this defendant's said firm of Henry S. King &
65 Co. as being the agent of the said Utica, Ithaca and Elmira Railroad Company for the sale on its behalf and for its account of the said bonds, and wholly suppressed and concealed from this defendant that he was not acting on behalf of such railroad company (which had no bonds to sell), but was in fact acting as the agent for the plaintiff and other persons who were, or claimed to be, owners of the said bonds.

And he further avers that in the course of the agency of the said Greenough, for and on behalf of the plaintiff and others as aforesaid, the said Greenough, in order to induce the said firm of Henry S. King & Co. to purchase such bonds (the greater part of which belonged to the plaintiff), made to the said firm of Henry S. King & Co. the false and fraudulent representations and statements hereinafter set forth, and in the mode and manner hereinafter described.

(1.) The said Greenough falsely and fraudulently represented that in selling such bonds he was acting for and on behalf of the said Utica, Ithaca and Elmira Railroad Company, which was by him represented to be the owner of such bonds, and the said Greenough fraudulently suppressed and concealed the fact from the said Henry S. King & Co. that such bonds, or if not all, certainly the greater part thereof, were the property of divers persons and parties to whom the same had been negotiated by the company, and who were or claimed to be the owners thereof, and that it was on behalf of such persons, and not on behalf of the said company, that the said Greenough was acting and endeavoring to (as he afterwards did) sell the said bonds to this defendant's said firm.

(2.) The said Greenough falsely and fraudulently represented to the said firm of Henry S. King & Co. that the firm of Morton, Bliss & Co., of New York, and their English representatives, the firm of Morton, Rose & Co., of London, had taken an interest to the extent of twenty thousand pounds sterling in a syndicate formed to float and dispose of

66 the said bonds, whereas the said statement was wholly untrue, and was known by said Greenough to be so, and the only interest that said firm of Morton, Bliss & Co., or Morton, Rose & Co., had in, to, or in respect to such bonds, was as pledgees of a certain portion thereof, for a loan which had been theretofore made by or on behalf of one or both of said firms.

(3). The said Greenough fraudulently exhibited to said firm of Henry S. King & Co. a prospectus and a map, copies of which are hereunto annexed, and marked Exhibits A and B, respectively, which, as this defendant is informed and believes, had been printed and published under his directions, and falsely and fraudulently represented and declared the said prospectus to be a correct statement of the facts in respect to such bonds and the mortgage securing the same, and the property covered by said mortgage, and the affairs of the company which had executed such bonds, and of the condition and prospects thereof, and that said map correctly represented the railroad of said company and its existing connections. And defendant further avers, upon information and belief, that copies of the said prospectus and map were sent by the said Greenough to America, through said Henry W. Poor, and were exhibited to and seen by the plaintiff as well as the other parties to the said agreement, and were assented to and ratified and approved by the plaintiff and such other parties. And he avers that the said prospectus and the said map, so as aforesaid exhibited by said Greenough to the said firm of Henry S. King & Co., were false and fraudulent and calculated and intended to deceive in the following among other material respects:

(*a.*) The said prospectus states that of the share capital of two million dollars the sum of one million and forty thousand dollars had been fully paid, whereas the amount paid was substantially less than the said sum.

67 (*b.*) The said prospectus states that the said railroad commenced at Elmira and Corning, whereas the fact was that it actually commenced only at Horseheads, and neither at Elmira nor Corning, nor did the said railroad extend to either of such points, nor has the said railroad, up to the present time, been extended thereto, or to either of them.

(*c.*) The said prospectus states that the said railroad, at such points, forms connections with the Northern Central Railroad and the Blossburg & Corning Railroad of Pennsylvania, whereas the fact was that it did not and never had nor has it ever since that time formed a connection either at Elmira or at Corning, or at any other point, with the said Blossburg & Corning Railroad of Pennsylvania.

(*d.*) The said prospectus states that the aggregate coal tonnage of the three so-called intersecting railroads (referring to the Northern Central Railroad, the Blossburg and Corning Railroad of Pennsylvania, and the Lehigh Valley Railroad) carried northwards during the year 1873 amounted to two million two hundred and fifty-four thousand tons, for the whole of which the Utica, Ithaca and Elmira Railroad would afford a route to the points of destination shorter than any other line built or projected, whereas the fact was that said railroad afforded a route only for a comparatively small portion of the coal tonnage above referred to, and the relations of the other railroads carrying such coal tonnage to such Utica, Ithaca and Elmira Railroad, and to each other, and in respect to carriage of coal to the points to which the coal tonnage of such roads was to be

transported, were such that the said Utica, Ithaca and Elmira Railroad could not be expected, with any show of reason, to carry any portion of such coal tonnage, except only such comparatively insignificant portion thereof as was to be delivered at local points upon its own route, and the said Greenough, as well as the plaintiff and the other parties to such
68 agreement, well knew that fact at the time when such prospectus was prepared and was exhibited to the said firm of Henry S. King & Co., and the said Utica, Ithaca and Elmira Railroad has never carried to the points of destination of such coal tonnage any considerable portion thereof, and the only coal tonnage which the said Utica, Ithaca and Elmira Railroad has had has consisted of coal to be carried by it in small quantities to local points upon the line of its road, as the said Greenough and the plaintiff and the other parties to said agreement, at and prior to the time when such prospectus was issued and exhibited to said firm of Henry S. King & Co. well knew must inevitably be the case.

(*e.*) The said prospectus states that the president of the Blossburg and Corning Railroad Company was prepared, upon the completion of the Utica, Ithaca and Elmira Railroad, to enter into contracts, guaranteeing to it all the coal traffic which it could accommodate, but the fact was that such president of the Blossburg and Corning Railroad Company was not prepared to enter into and never did enter into such or any such contracts with the said railroad company, and never gave or caused to be given to the said railroad company any coal traffic whatsoever, but, on the contrary, such president constructed another line to carry such coal traffic, instead of causing the same to be carried over the Utica, Ithaca and Elmira Railroad.

(*f.*) The said prospectus states that favorable contracts for the interchange of passenger traffic and freight had been entered into with the Northern Central Railroad, the Erie Railway, and the Geneva, Ithaca & Athens Railroad, whereas the fact was that no such contracts had been entered into with either of said corporations, the only contract existing with any such corporations being a most disadvantageous and onerous contract for the carriage, by the Erie Railway Company, from Elmira to Horseheads, of passenger traffic and freight coming from or intended for the said Utica, Ithaca and Elmira Railroad.

69 (*g.*) The said prospectus states that the receipts from the coal traffic transportation would average at least one and one-half cents per ton per mile; but the fact was that such receipts have never averaged such or any such rate, and that such rate was, and was at the time of the issuing of such prospectus and its exhibition to said firm of Henry S. King & Co., well known by the said Greenough and the plaintiff and the other parties to such agreement, and by all persons familiar with American railways, to be an inordinately high rate, and one which could not be reasonably expected to be earned for such transportation.

(*h.*) The said prospectus states that sixty per cent. of the gross earnings would be a high rate for the calculation of the working expenses of the said railroad; whereas the fact was, as the said Greenough and the plaintiff and the other parties to said agreement well knew, such rate was an inordinately low rate, which could not be reasonably expected to be the rate of the working expenses as compared with the gross earnings of the said railroad.

(*i.*) The said prospectus states that the cash expenditure upon the road had already been one million eight hundred thousand dollars, of which sum one million and forty thousand dollars had been derived from subscriptions at par to the shares of the company, and the remainder from cash advances made by the proprietors of the neighboring collieries and others interested in the speedy completion of the line; whereas the fact was that the cash expenditure upon the said road had not been one million eight hundred thousand dollars, and one million and forty thousand dollars had not been derived from subscriptions at par to the shares of the company, and no part of any difference between one million and forty thousand dollars and one million eight hundred thousand dollars had been derived from cash advances made by any proprietors of any neighboring collieries,
70 and any such cash advances as may have been made in connection with such road were made by contractors under their contracts with the said railroad company for the construction thereof.

(*j.*) The said prospectus states that the proceeds of the bonds then offered for subscription would be applied, in the first place, to the completion and equipment of the road, and afterwards to the entire liquidation of the company's floating debt; whereas the fact was, as this defendant verily believes, that under the agreement above mentioned it was expressly prescribed that the first proceeds of such bonds were to be applied to relieve and redeem the bonds pledged by said Ezra Cornell and to pay his obligations secured thereby, which obligations were at the time supposed to be at least the sum of two hundred and fifty thousand dollars, and that it was only after such application of the first proceeds of such bonds that any proceeds thereof were to be applied to or toward the completion or equipment of the road.

(*k.*) The said prospectus states that the entire line would be completed and equipped in the following June, in time for the summer coal movement, which began in July; whereas the fact was that such road was not and could not have been reasonably expected to be completed within such time.

(*l.*) The said map represents the said railroad as commencing at Corning and Elmira and running to Cortland, whereas, in fact, the said road began only at Horseheads, and not at Corning or Elmira.

(*m.*) The said map represents a railroad as running between De Ruyter and Utica, by way of Smith's Valley, and another railroad as running between De Ruyter and Cazenovia, whereas, in fact, no road existed between De Ruyter and Utica, by way of Smith's Valley, or between De Ruyter and Cazenovia, as said Greenough and the plaintiff, and other parties to such agreement, very well knew.

71 (*n.*) The representation upon the said map of the relative locations of material and important points, with reference to the transportation of passengers and freight, and of the lines of communication between such important and material points, was wholly false and fraudulent.

4. The said Greenough, in a letter signed and addressed, and delivered by him to the said firm of Henry S. King & Co., bearing date the first day of September, 1875, falsely and fraudulently, and in order to induce said firm to purchase such bonds, wrote as follows: "The railway (meaning the said Utica, Ithaca & Elmira Railroad) has been built and admin-

istered with the same economy and care that its managers use in their private concerns. No vicious system of contracts has been allowed to waste money, but the company's funds have been expended by its own officers with regard solely to obtaining the best and cheapest of everything." whereas the fact was that the said road had been constructed on the most vicious system of contracts, and the said Ezra Cornell had been a contractor therefor, and the said Burt and Rodbourn had been, in reality, interested in such contracts, and thereby the moneys of the said company have been recklessly wasted by the persons concerned in the management of its affairs.

5. That the said Greenough, on many occasions, falsely and fraudulently, and in order to induce said firm to purchase such bonds, orally stated to the said Henry S. King & Co., the matters hereinbefore mentioned and referred to, as having been stated in the said prospectus, and that the said Greenough, in connection with the preparation of a further prospectus, at or about the end of the year 1875, or the beginning of the year 1876, falsely and fraudulently, and in order to induce said firm to purchase such bonds, stated and represented to the said firm of Henry S. King & Co. that the actual gross earnings of the said railroad company were
72 then at the rate of about $300,000 per annum, of which 40 per cent. would be net, and that the estimated gross receipts from coal transportation would yield a further sum of $250,000 per annum; and afterwards, as this defendant is informed and believes, a copy of a prospectus containing such statement was sent to America, through said Greenough, for approval and confirmation, and in response thereto the said Burt, who was then the president of the said railroad company, cabled to said Henry S. King & Co. as follows: "Prospectus states coal traffic twenty-five per cent. below actual present contracts, and local receipts forty per cent. below what road now earning. Local receipts since opening give daily average $1,100, and coal traffic, as secured, will yield revenue $1,100 daily additional;" whereas the said railroad company had no then present contract for coal traffic whatever, and was not transporting any coal upon its line, and the statement of local receipts in such prospectus was far in advance of the local receipts earned by the said road, and such local receipts did not give anything like a daily average of $1,100, and no coal traffic whatever had been secured, and the said Greenough, falsely and fraudulently, and in order to induce such firm to purchase such bonds, frequently represented to the said firm of Henry S. King & Co. that the earnings of the said railroad amounted to $300,000 per annum, exclusive of coal; whereas *as* the fact was that the said railroad was not earning the operating expenses thereof, and was not earning, in the aggregate, the sum of $150,000 per annum.

6. That the said Greenough, falsely and fraudulently, and in order to induce said firm to purchase such bonds, represented to the said Henry S. King & Co. that the said railroad company owned fourteen locomotives, two hundred and fifty freight cars and twenty passenger cars; whereas, as said Greenough, and the plaintiff and the parties to said agreement well knew the fact was that such railroad company did not own more than nine locomotives, and fifty freight cars, and eleven passenger cars.

73 Eleventh. The said Greenough falsely and fraudulently, and in order to induce such firm to purchase said bonds, represented to said firm that the fully paid capital stock of said company, as early as the first day of June, 1876, amounted to $1,512,650, whereas the fact was that

the amount of the fully paid capital stock of said company was then less than that amount by more than half a million of dollars, as said Greenough and the plaintiff, and the other parties to said agreement well knew.

Twelfth. And this defendant further says that in the month of October, 1875, while on a visit to America on other business, he was, by the said defendants, Henry W. Poor and William L. Burt, taken over the said line of the said railroad by a special train, and was shown by them a considerable number of cars loaded with coal along the line thereof, which cars were pointed out by the said Poor and Burt to this defendant as indicating the amount of freight being carried upon the line of the said railroad, whereas, in truth and in fact, as defendant is informed and believes, the said road was not carrying any coal at that time as freight and was earning no money by the carriage of coal, and the said cars were fraudulently placed along the line of said road for the mere purpose of exhibiting the same to this defendant, and thus deceiving him in respect to the amount and character of the transportation upon such line; and this defendant has been informed by the defendant Rodbourn, that such deception so practiced upon this defendant was made known to him, and that he was promised by the said defendants Poor and Burt that if he would not disclose the same or other facts which would reveal the true state of the said railroad to this defendant, certain claims which had been asserted by the said Rodbourn, would be paid out of the first moneys received as the result of such fraud and deception.

74 Thirteenth. That in or about the month of February, 1876, as this defendant is informed and believes, the parties to the said contract of October 29, 1874, caused to be delivered to one George J. Rice, to be delivered to the firm of Henry S. King & Co., in order to induce them to purchase bonds of the said railroad company, certain papers purporting to be weekly statements of the earnings of the said Utica, Ithaca and Elmira Railroad Company for the weeks ending December 21, 1875; January 1, 1876; January 8, 1876; January 14, 1876; January 21, 1876; January 31, 1876; February 7, 1876; February 14, 1876, such weekly statements being signed by the treasurer of the said railroad company, and having the seal of said company affixed thereto; and this defendant avers that, as he is informed and believes, such statements and the items contained therein were false and fraudulent, and calculated and intended to deceive the said firm of Henry S. King & Co., in respect to the said railroad and the earnings thereof, and the value of and security for the bonds of said company.

Fourteenth. That the said defendants Henry V. Poor, one of the trustees under the said agreement of October 29, 1874, and Henry W. Poor, the agent of such trustees, in a certain railroad manual of the United States, prepared and published by them in or about June, 1876, falsely and fraudulently, and in order to induce the said firm to purchase such bonds, made and published, and sent to the said firm of Henry S. King & Co., the following statement respecting the said railroad company, viz:

75 UTICA, ITHACA AND ELMIRA RAILROAD.

Consolidation of the Ithaca & Cortland and the Utica, Horseheads & Elmira Railroads, opened for traffic from Cortland to Ithaca in 1872, and throughout in December 1875.

LINE OF ROAD.—Cortland (Delaware, Lackawana & Western Junction), N. Y., to Elmira, N. Y., 72 miles.

Sidings and other tracks..... 7 miles.

Gauge, 4 feet 8½ inches; rail (iron and steel) 56 to 60 lbs.

The object of this road was to supply a direct northeastern outlet for the bituminous coal of the Blossburg mines, to its most important markets in Central and Eastern New York.

This coal is now reached at Corning, on the Erie, where it is delivered by the Corning, Cowanesque & Antrim Railroad, the tonnage of which has reached as high as 1,000,000 of tons in one year. The greater part of this coal will, after July of the present year, be delivered at Elmira, directly to the Utica, Ithaca & Elmira R. R. by completion of the Elmira State Line Railroad, which connects the U., I. and E. R. R. with the Tioga R. R. of Pennsylvania.

Corning is now reached by a third rail on the Erie, twelve miles in length, the property of the U., I. and E. R. R. Co. from Horseheads, a common point on both lines, and six miles north of Elmira.

The main line between Cortland and Elmira crosses at Freeville the Southern Central R. R.; at Mottville, the Cayuga and Susquehanna branch of the Delaware, Lackawanna & Western; at Spencer, the Geneva, Ithaca & Athens R. R., which is the northern extension and property of the Lehigh Valley R. R.; at Horseheads, the Northern Central Railway of Pennsylvania, extending from Northern and Central New York to Baltimore and Washington. At Cortland this line crosses the north-
76 ern extension of the Delaware, Lackawanna & Western R. R., by which Syracuse is reached, and a through line of uniform gauge secured from Corning to Syracuse. From Cortland, by existing connections, Utica on the New York Central Railroad is reached.

During the present year another outlet to the New York Central at Canastota, by the extension of the Cazenovia & Canastota R. R. to De Ruyter, on the Midland, 20 miles from Cortland, will be opened for this line; and a fourth outlet to the New York Central will also be given by completion this summer to Auburn of the line formerly belonging to the Midland Company, but now reorganized and operated by the U., I. & E. R. R. Co., extending from Freeville to Scipo, 27 miles and to within 10 miles of Auburn.

ROLLING STOCK.—Locomotive engines, 14; passenger cars, 20; mail, baggage and express cars, 6; and freight cars 250; total of all revenue cars, 276.

OPERATIONS from December 14th, 1875, the date of the opening of the road, to April 14th, 1876, a period of four months. Gross earnings—passenger, $33,763.84; freight, $70,635.52; mail and express, $9,786; other, $4,671.09—total, $118,856.45; operating expenses, $64,514.25; net earnings, $54,342.20. At this rate the net earnings for the year would amount to over $160,000. The annual interest charges amount to $105,000, gold. The excess of earnings over interest accounts has, for the last year, been applied to construction account. The above earnings are exclusive of the

coal traffic which this line will receive on opening of the Elmira State Line R. R.

77 FINANCIAL STATEMENT.—June 1, 1876. Capital stock authorized, $2,000,000; paid in, $1,512,650; funded debt, 1st mortgage gold and sterling sinking fund, 7 per cent. bonds, dated May 11, 1872, interest payable January and July, and principal July 1, 1902, $1,500,000; total stock and bonds, representing the cost of the road and equipment, $3,012,650.

Statement of funded debt in detail.

Title and character of bonds.	Date of bonds.	Interest.		Principal, when due.	Amount of bonds.
		Rate.	When payable.		
First m'tg. sinking fund gold and sterling	May 11, 1872.	7	Jan. and July.	July 1, 1902.	$1,500,000

DIRECTORS (elected June 14, 1876): Edwin Eldridge and H. W. Rathbone, Elmira, N. Y.; F. N. Drake, Corning, N. Y.; F. C. Cornell, O. B. Curran, and J. F. Hixson, Ithaca, N. Y.; H. P. Goodrich, Cortland, N. Y.; Henry V. Poor, Brookline, Mass.; Joseph Rodbourn, Breesport, N. Y.; D. D. Reynolds, Horseheads, N. Y.; J. H. Rodbourn, Erin, N. Y.; A. B. Cornell and Henry W. Poor, New York City.

Edwin Eldridge, president, Elmira, N. Y.

Joseph Rodbourn, vice-president and general manager, Breesport, N. Y.

Secretary, R. M. McDowell, Elmira.

Treasurer, O. B. Curran, Ithaca.

Auditor, W. M. Serat, Elmira.

Chief engineer, M. Rickey, Ithaca.

Principal office and address, Elmira, N. Y.

Whereas the fact was that the representations in such statement contained in respect to the rolling stock, operations, and so-called financial statement of said company were almost without exception false and fraudulent, and the whole statement was contrived for the purpose of misrepresenting to said firm, as well as other possible purchasers of such

78 bonds, the condition and circumstances and connections of said railroad.

And upon information and belief this defendant avers that there was paid, and was allowed by the said plaintiff and said Rodbourn to be paid, out of the proceeds of the sales of such bonds, through the said Greenough, in England, in order to prevent a default on said bonds, amounts sufficient to provide and pay the interest coupons falling due on the first day of July, 1875, and on the first day of January, 1876, and on the first day of July, 1876, and on the first day of January, 1877, upon such of said bonds as had been sold in England, or were outstanding in the hands of parties other than the parties who had executed the said agreement, or were engaged in carrying out the same, and that no interest was ever otherwise paid upon said bonds, and he avers that when such payments on account of interest were made out of the proceeds of such bonds in such a way as that that fact came to the knowledge of this defendant, the said Greenough, falsely and fraudulently, and in order to induce said firm to purchase such bonds, stated to this defendant that the amount of such interest

had been earned by the said railroad and stood to its credit in America, but that such payments were made out of the proceeds of such bonds only for the purpose of saving the cost of exchange upon the transmission of the proceeds of such bonds to America, and the transmission of such earnings of the said railroad to England; whereas, in fact, no such amounts of interest had been earned by said railroad, nor did any such sums stand to its credit in America.

Fifteenth. And this defendant states that each and every of the acts, doings, representations, and statements hereinbefore complained of were done and made for the sake of inducing and did induce said firm of Henry S. King & Co. to purchase the bonds of the said railroad company, which were offered for sale through the said Greenough, under the said
79 agreement of the 29th of October, 1874, above mentioned on behalf of the plaintiff and other parties to said agreement, and were intended to be and were relied upon by the said Henry S. King & Co., in making such purchases; that such acts, doings, statements, and representations were wholly fraudulent and calculated and intended to (as they did) deceive said firm of Henry S. King & Co., and that, by reason thereof, and in reliance thereon, the said firm of Henry S. King & Co. were induced to purchase and did purchase, through the said Greenough, between the 15th day of February, 1875, and the 1st day of July, 1877, such bonds to the amount, in the aggregate, at their par or face value of upwards of $832,000, and paid to the said Greenough, as the purchase price thereof, upwards of one hundred and seventeen thousand eight hundred and fifty pounds sterling, and that said Greenough and Henry V. Poor and Thomas N. Rooker, trustees, as in said agreement stated, as this defendant is informed and believes, accepted and received the same under and by virtue of the said agreement of the 29th October, 1874, and for the benefit as therein expressed of the plaintiff and the other parties to the said agreement, and afterwards caused the same to be applied entirely or in great measure to the purposes in said agreement mentioned.

Sixteenth. That such bonds have ceased to have any market value, and have become almost, if not entirely, worthless, and that by reason of the premises, and in consequence of the fraudulent acts, doings, representations, and statements above mentioned, the said firm of Henry S. King & Co. have suffered damage and injury to the amount of upwards of five hundred thousand dollars, for which sum the said plaintiff became liable to the said firm of Henry S. King & Co., and is now liable to this defendant.

Wherefore this defendant prays judgment against the said plaintiff for the sum of five hundred thousand dollars, besides the costs and disbursements of this action.

EVARTS, SOUTHMAYD & CHOATE,
Attorneys for Defendant King.

80 CITY AND COUNTY OF NEW YORK, *ss:*

Henry Seymour King, being duly sworn, deposes and says that he is one of the defendants in the above-entitled action; that he has read the foregoing answer in said action, and knows the contents thereof, and that the same is true to his own knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true. And further saith not.

H. S. KING.

Sworn to before me this 17th day of March, 1881.

WM. R. MONTGOMERY,
Notary Public, New York County.

80*a* *Exhibit A, referred to in the annexed answer.*

STATE OF NEW YORK, UNITED STATES OF AMERICA.

The Utica, Ithaca and Elmira Railroad Company.

Share capital $2,000,000, of which $1,040,000 have been subscribed and fully paid. Issue of £300,000 (or $1,500,000), being the entire issue of the company's first mortgage seven per cent. sterling bonds, in 1,500 bonds of £200 (or $1,000) each, bearing interest at the rate of £7 3*s*. per cent. sterling per annum, payable in London on the 1st July and 1st January in each year. Redeemable at par in 1902, the redemption provided for by the operation of a sinking fund of £6,000 per annum and accumulating interest, commencing in 1878.

DIRECTORS.—A. B. Cornell, vice-president of the Western Union Telegraph Company, New York; Geo. J. Magee, president of the Blossburg and Corning Railroad Company, and Fall Brook Coal Company, Corning, N. Y.; John McGraw, president First National Bank, Ithaca, N. Y.; Hon. J. H. Selkreg, New York State senator for the district, Ithaca, N. Y.; Wm. L. Burt, United States postmaster, Boston, Mass.; Joseph Rodbourn, lumber merchant, Elmira, N. Y.; O. B. Curran, treasurer of the Ithaca Savings Bank, Ithaca, N. Y.; Hon. R. H. Duell, Member of Congress for the district, Ithaca, N. Y.; C. C. Taylor, merchant, Cortland, N. Y.; H. P. Goodrich, railway superintendent, Cortland, N. Y.; C. H. Branscomb, New York (late United States consul at Manchester, England); H. W. Poor (Messrs. H. V. and H. W. Poor, proprietors of "Poor's Railway Manual"), New York.

Messrs. Cummins & Chinnery will receive subscriptions for the above bonds at the rate of £175 per bond (inclusive of accrued interest from 1st January, 1875), at which price the bonds will return £8 10*s*. per cent. per annum to investors.

Instalments payable as follows:

£10	per bond,	payable on	application.
35	"	"	allotment.
40	"	"	1st April, 1875.
40	"	"	1st May, 1875.
50	"	"	1st July, 1875.
£175			

Subscribers will have the option of paying up in full on allotment under discount at the rate of 5 per cent. per annum.

The Utica, Ithaca and Elmira Railroad, 65 miles in length, runs in a northeasterly direction across the centre of the State of New York,
80*b* between the Erie and New York Central Railways. It commences at Elmira and Corning, at which points it forms connections with the Northern Central Railroad and the Blossburg and Corning Railroad

of Pennsylvania; proceeding eastwards it connects with the Pennsylvania and New York division of the well known Lehigh Valley Railroad, the Delaware, Lackawanna and Western Railroad, and five other lines of minor importance which extend north and south between the parallel lines of the Erie and New York Central roads.

The Utica, Ithaca and Elmira Railroad possesses, by its connections with so many important roads, unrivalled facilities for the receipt and distribution of traffic throughout the thickly populated district which it serves, and offers, in addition, the shortest and best route from the coal fields of Northern Pennsylvania to the cities of Utica and Syracuse, the New England States, and Canada.

The three intersecting railroads first above mentioned are among the principal coal-carrying railways of the State of Pennsylvania, their aggregate coal tonnage carried northwards during the year 1873 amounting to 2,254,000 tons, for the whole of which the Utica, Ithaca and Elmira Railroad will afford a route to the points of destination shorter than any other line built or projected.

The president of the Blossburg and Corning Railroad Company (whose coal tonnage for the year 1873 amounted to 1,020,000 tons), and of the Fall Brook Coal Company (whose production in 1873 was 312,466 tons), is one of the directors of the Utica, Ithaca and Elmira Railroad Company, and is prepared, upon completion of the latter road, to enter into contracts guaranteeing to it all the coal traffic which it can accommodate.

Favourable contracts for the interchange of passenger traffic and freight have also been entered into with the Northern Central Railway, the Erie Railway, and the Geneva, Ithaca and Athens Railroad, which last connects with the Lehigh Valley Railroad.

The receipts from coal traffic transportation will average at least 1½ cents per ton per mile, and the company will receive tonnage dues on 65 miles of road, equivalent to 97 cents per ton of through traffic. Assuming that the coal traffic carried by the company will amount to only 280,000 tons per annum (or little more than one-quarter of that conveyed over the shorter road of the Blossburg and Corning Company), and calculating the working expenses at the high rate of 60 per cent. of the gross earnings, the coal traffic alone, exclusive of all local and general traffic, will provide the interest upon the entire bonded debt of the company.

Mr. James Macfarlane, the well known author of "The Coal Regions of America," and the general sales agent of the Blossburg, Fall Brook, Morris Run, and McIntyre Coal Companies, whose production in 1873 amounted to 1,203,519 tons, in a letter to the president of the Utica, Ithaca and Elmira Railroad Company, estimates that there will be open to the latter at least 500,000 tons of semi-bituminous coal to be transported annually to Syracuse and other points east of that city.

The cash expenditure upon the road has already been $1,800,000, of which sum $1,040,000 have been derived from subscriptions at par to the shares of the company, and the remainder from cash advances made by the proprietors of the neighboring collieries and others interested in the speedy completion of the line.

The proceeds of the bonds now offered for subscription will be applied in the first place to the completion and equipment of the road, and afterwards to the entire liquidation of the company's floating debt.

The work remaining to be done, as certified by the engineer of the com-

pany, comprises the construction of only seven miles of railway, and the laying of iron upon seven additional miles, the rails and fastenings for which have been delivered, and the grading done. The entire line will be completed in June next, in time for the summer coal movement, which begins in July.

80c On the road and its equipments, freed from obligations and encumbrances of every sort, and thoroughly organized to meet the demand for traffic accommodation, the holders of bonds now offered for subscription will possess a permanent first charge.

The directors of the company are men of wealth and experience, and are closely identified with the company's road and the colliery and other interests which it serves.

The following is an exhibit of the results of the operations of the leading coal transportation companies in Pennsylvania, after payment of the interest on their debenture debt :

				Average annual dividend on share capital.
Delaware and Hudson Canal and Railroad Company for	33	years	divided	13 03 per cent.
Pennsylvania Coal and Railroad Company	" 18	"	"	14 53 "
Lehigh Valley Railroad	" 11	"	"	12.30 "
Delaware, Lackawanna and Western Railroad	" 9	"	"	13 26 "
Philadelphia and Reading Railroad	" 7	"	"	10.71 "
New Jersey Central Railroad	" 12	"	"	13.17 "

Copies of the mortgage deed, of the sworn certificate of the president of the company, and of Mr. Macfarlane's letter to him, may be seen at the offices of Messrs. Haywards, Keele & Swann, solicitors, 5, Frederick's Place, Old Jewry, London.

In the event of no allotment being made, the deposit will be returned in full ; and if only a portion of the amount applied for is allotted, the surplus of the deposit money will be first applied towards the payment due on allotment.

On payment of the amount due on allotment, scrip certificates to bearer will be issued, exchangeable, after payment of the last instalment, for fully paid bonds of the company.

Failure in the payment of any instalment when due will render all previous payments liable to forfeiture.

Prospectuses and forms of application may be obtained of Messrs. Cummins & Chinnery, 1, Angel court, London, E. C., or at the London & County Bank, 21, Lombard street, London, E. C., and branches.

Applications for bonds on the accompanying form, together with a deposit of £10 per bond, must be sent to the bankers.

Messrs. Haywards, Keele & Swann, solicitors, of 5, Frederick's Place, Old Jewry, certify that Mr. Swann has personally examined in America the property and organisation of the company and the enactments governing the creation of this issue of bonds, and has satisfied himself that the issue is in conformity with the laws of the State of New York and of the United States, and that the bonds form a first charge on all the property of the railroad company.

13TH FEBRUARY, 1875.

(Here follows sketch map of the U., I. & E. R. R. Co. & connections marked page 80*d*.)

81 Supreme court, Tompkins County.

FRANKLIN C. CORNELL, AS ADMINISTRATOR OF the goods, chattels, and credits of Ezra Cornell, deceased,

against

THE UTICA, ITHACA AND ELMIRA RAILROAD Company and others.

CITY AND COUNTY OF NEW YORK, *ss:*

Henry Seymour King, being duly sworn, deposes and says: That he is one of the defendants in the above-entitled action, and that he has this day verified an amended answer on his own behalf in the said action, and he prays leave to refer to said amended answer and the allegations therein contained with the like effect as if they were inserted in this affidavit.

82 And deponent further says, that on the 29th day of April, 1878, he was present at an interview between the plaintiff in this action, William L. Burt, George J. Rice, Sidney T. Fairchild, and himself and others at the office of Henry W. Poor, in the city of New York; that deponent having theretofore learned that the said Rice, though without sanction of, or authority from, the firm of Henry S. King & Co., or this deponent, had written some letter to the plaintiff in this suit in reference to the plaintiff sharing pro rata in respect to bonds of the Utica, Ithaca and Elmira Railroad Company held by him as the said firm of Henry S. King & Co., shared for their bonds of the said company, and which letter was not authorized or approved by the said firm of Henry S. King & Co., or by this deponent, had directed the said George J. Rice to plainly notify the plaintiff, as he did notify him as hereinafter stated; that thereupon the said Rice under such instructions in deponent's presence and hearing expressly notified the plaintiff as well as the said Burt that in case the firm of Henry S. King & Co. should purchase or should direct the purchase of the mortgaged premises or any part thereof, at the sale thereof, to take place on the 30th day of April, 1878, under the decree of foreclosure in the suit for the foreclosure of the mortgage of said railroad company, any such purchase would be for their own account and subject to their own directions, and the property purchased would be held and disposed of as they should see fit, without any trust or obligation of any kind in favor of the said plaintiff or said Burt, or any other person or party in respect thereto, and that the plaintiff, as well as the said Burt, must themselves protect at such sale any interest which they or either of them had or claimed to have in, to, or in respect to the mortgaged premises or any part thereof, and Sidney T. Fairchild, the attorney for the plaintiff in such foreclosure suit, then and there expressly offered to the plaintiff and to the said Burt an adjournment of the sale of said mortgaged premises

83 under the judgment in such foreclosure suit from the time at which such sale had been advertised, if they or either of them desired further time in order to enable them or either of them to make any further arrangements in respect to the protection of their or his interests or alleged interests in, to, or in respect to such premises, but the said plaintiff as well as the said Burt expressly stated that he desired no adjournment of said

sale for any such purpose, and thereafter and on the following day, to wit, the 30th day of April, 1878, the said mortgaged premises were sold under the said decree; that the said plaintiff was present at such sale, and made no objection thereto, and that thereafter the sale of said premises was confirmed by the court in which such foreclosure suit was pending, without objection from the plaintiff in this suit, or any opposition on his part to such confirmation thereof.

And deponent further says, that the said plaintiff has not, nor has the said Burt, ever tendered or offered to pay to said Henry S. King & Co. or to this deponent a ratable or any proportion of the expenses of the purchase of the said mortgaged premises, or connected therewith, or of the expenses of the organization, equipment, and operation of the said Utica, Ithaca and Elmira Railway Company, which expenses, to the amount of one hundred and fifty thousand dollars (including the amount of fifty thousand dollars which was paid by this deponent's said firm to the purchasers at such sale as the purchase price of the mortgaged premises under such foreclosure sale thereof), have been already paid by said Henry S. King & Co., or by this deponent as survivor of said firm, or ever tendered or offered to deliver to said Henry S. King & Co., or to this deponent, any bonds of said Utica, Ithaca and Elmira Railroad Company, for exchange for bonds of said Utica, Ithaca and Elmira Railway Company, or for any other purpose whatsoever; and deponent says, that, as he is informed and believes, the said plaintiff and said Burt had but very few, if any, of such bonds which they could have tendered even if they had seen fit to tender the same.

84 And deponent further denies that there was ever any valid, lawful, or sufficient consideration for any such alleged or pretended agreement or arrangement as is referred to in folios 33 to 38 of said complaint, and avers that no such alleged or pretended agreement or arrangement, in writing, subscribed by or on behalf of the defendant's said firm of Henry S. King & Co., or this deponent, or any party to be charged therewith, was ever in any wise made or executed in favor of or delivered to the plaintiff; and he avers that any such pretended agreement or arrangement would be wholly void under the general rules of law applicable to such cases, and also, by reason of the statute of the State of New York commonly called the "Statute of Frauds."

And this deponent further respectfully submits to the court whether the defendant The Utica, Ithaca and Elmira Railway Company has any right, under the law of the State of New York, to execute or deliver any bond or other similar obligation for or in respect of any formerly existing bonds or obligations of the Utica, Ithaca and Elmira Railroad Company, or whether the issue of any such bonds or other obligations by the said Utica, Ithaca and Elmira Railway Company would be unauthorized and contrary to law and invalid.

And deponent further says, that heretofore, and on or about the 8th day of October, 1880, as he is informed and verily believes, the board of directors of the said Utica, Ithaca and Elmira Railway Company met, pursuant to call, at the office of said company in Elmira, in the State of New York; that thereupon resolutions were, as deponent is informed and verily believes, duly passed by the said board, authorizing the execution of an indenture of mortgage or deed of trust to John Paton and John B. Dumont,

to secure the issue of bonds of the said railway company to the amount, at their par or face value, of six hundred thousand dollars, and authorizing the issue of such bonds; that thereupon such mortgage was duly
85 executed on behalf of such company, and the same was thereupon, as deponent is informed and believes, duly registered in the counties where the mortgaged premises in said indenture of mortgage or deed of trust were and are situated, and that thereupon such bonds, and each of them, having been countersigned by the trustees named in said indenture of mortgage or deed of trust, were duly issued and negotiated by and on behalf of said company, and that all of the said bonds have been duly negotiated by said company, and are held by bona fide holders of such bonds for value, and that such bonds are good and valid outstanding obligations of the said railway company, in the hands of divers persons and parties who have become and are bona fide holders thereof for value, and that none of such bonds, on the 24th day of November, 1880, remained in any wise in the hands or under the control of the said railway company, and deponent denies that such issuing and negotiation of bonds was in any wise in violation of any of the rights of the plaintiff.

And he further avers that it is true that some of such bonds are within the physical possession and custody of the said firm of Henry S. King & Co., said firm, however, holding them for and on behalf of divers persons and parties to whom they were negotiated in or about October, 1880, and long before the granting of any injunction in this suit, and that although such firm of Henry S. King & Co. have the actual physical possession and custody of such bonds, they hold possession thereof as they hold possession of divers other securities for their customers to large amounts, as custodians, and for the account and subject to the order of the persons to whom they belong, and the disposition of such bonds is wholly under the control of such persons.

And deponent further says that it is true that when, upon, or shortly after, the organization of the defendant railway company, nineteen thousand six hundred and eighty shares of the capital stock of the said railway company were placed in the name of said George J. Rice, they were so placed in his name, and thereafter for a little while held by him,
86 for the account of the said firm of Henry S. King & Co., but deponent says that the said Rice long since ceased to hold such stock for the account of the said Henry S. King & Co., who, prior to the first day of May, 1880, but under arrangements made as early as July, 1879, transferred their interest therein to other persons who have since held the same, and that the certificates for such shares of stock are not under said Rice's control, but are, as deponent is informed and believes, under the control of the persons to whom the former interests of said Henry S. King & Co. therein were transferred, as above stated.

And deponent further says that there has been no purpose or intention in anything which has been done or contemplated in or about or in connection with the said Utica, Ithaca and Elmira Railway Company, or the said bonds thereof, or the mortgage securing the same, or the execution of such bonds or mortgage, or the negotiation of such bonds, or the dealings and transactions which have taken place in respect to the stock of said company or otherwise, on or about or in connection with any of the affairs of said company which was intended to injure, impair, or affect any rights

which the plaintiff might have under any alleged or pretended agreement which is claimed to have been entered into between the said plaintiff and the firm of Henry S. King & Co., or for the purpose of rendering any judgment that the plaintiff may obtain in this action ineffectual or of no avail, or of otherwise injuriously affecting any right or alleged or pretended right of the plaintiff, but that all such acts and things have been done simply in the ordinary course of the business of the management of the affairs of said railway, in order to promote the best interests of such company and to secure to the persons who have become by the negotiation thereof to them owners of the said bonds and said stock, such rights as lawfully appertain to such ownership thereof, and their consequent interests in the property of said railway company.

87 And deponent expressly denies the allegation contained in said affidavit of the said Cornell, sworn to on the 17th day of February, 1881, that as soon as he gets possession of the stock of the Utica, Ithaca and Elmira Railway Company, therein referred to, he intends to leave this country for England and to negotiate said stock in that country.

And deponent further denies that he for a long time, or for any time whatever, lead the plaintiff to believe that the said firm of Henry S. King & Co., or deponent, as survivor of said firm, or the said Utica, Ithaca and Elmira Railway Company were ready or willing to carry out the pretended agreement or arrangement set up in the complaint in this action by the issue and delivery to the plaintiff of new bonds to the amount of old bonds held by the plaintiff, and to which he was or claimed to be entitled, but, on the contrary, he avers that from the time of the commencement of this action, as against him, in or about January, 1879, he has steadily resisted the claims of the plaintiff therein, first by demurrer to the complaint of the plaintiff in said action, and afterwards by answer thereto, and deponent prays leave to refer to such demurrer and the proceedings thereon and to such answer as part of this affidavit.

He denies that either on his own behalf or on behalf of his said firm of Henry S. King & Co. he has since in or about April, 1880, claimed to own, or now claims to own, the stock of the Utica, Ithaca and Elmira Railway Company above mentioned, but on the contrary he avers that the rights of said firm of Henry S. King & Co. as of deponent to such stock have been heretofore transferred to other persons or parties as hereinbefore stated, and he denies that the said Utica, Ithaca and Elmira Railway Company is wholly owned and controlled by deponent or the firm of Henry S. King & Co.

And deponent further denies that said stock of the Utica, Ithaca and Elmira Railway Company so issued as aforesaid is about to be delivered by said Rice to deponent, and by him negotiated so as to get the

88 same in the hands of bona fide purchasers, or that he has come to or is in this country for that purpose, and he expressly denies the allegations contained in folios 9, 10, 11, and 12 of the affidavit of the plaintiff herein sworn to on the 17th day of February, 1881, and each and every of such allegations.

He further denies, upon and according to the best of his knowledge, information, and belief upon the subject, that such six hundred thousand dollars of bonds were issued secretly, or surreptitiously, or illegally, or with-

out adequate authority for such purpose, or for the purpose of in any wise defrauding the plaintiff, and upon the best of his knowledge, information, and belief upon the subject, he denies that such bonds were issued or the seal of said company was affixed thereto in Canada, but upon and according to his information and belief he avers that the seal of said company was affixed to the said bonds in the city, county, and State of New York, and not elsewhere.

And deponent further says that during the three months or thereabouts during which the railroad of the Utica, Ithaca and Elmira Railroad Company was in the hands of the receiver appointed to take possession and run and operate the same, under the receivership order of the 4th February, 1878, in the said foreclosure suit, the expenses of and connected with the operation of such railroad under said receivership were about thirty thousand dollars in excess of the gross earnings thereof, such railroad having been thus run at an average loss of about ten thousand dollars per month prior to the time of the foreclosure sale above referred to, and that since the time of such foreclosure sale and the organization of the Utica, Ithaca and Elmira Railway Company, to own and operate the said railroad, the expenses of and connected with the operation of said railroad have exceeded the amount of its gross earnings by about the sum of one hundred thousand dollars, besides the additional indebtedness incurred for rolling-stock for use upon said railroad, being a loss, disregarding the ex-
89 pense of such rolling-stock, of something like fifty thousand dollars per annum.

H. S. KING.

Sworn to before me this 17th day of March, 1881.

WM. CARY SANGER,
Notary Public, Kings Co., with cert. in N. Y. Co.

90 Supreme court, Tompkins County.

FRANKLIN C. CORNELL, AS ADMINISTRATOR OF the goods, chattels, and credits of Ezra Cornell, deceased,
against
THE UTICA, ITHACA AND ELMIRA RAILROAD Company and others.

CITY AND COUNTY OF NEW YORK, *ss:*

George J. Rice, being duly sworn, deposes and says that he is and at all times since the time of its organization has been the president of the Utica, Ithaca and Elmira Railway Company, one of the defendants in the above-entitled action, and has been and is familiar with the affairs of said company.

That he attended the sale on the 30th day of April, 1878, of the premises and property sold under the foreclosure of the mortgage executed by the Utica, Ithaca and Elmira Railroad Company mentioned in the complaint in the above-entitled action; that on the day preceding such sale deponent, together with Henry Seymour King, one of the defendants in said action, and Sidney T. Fairchild, who was the attorney for the plaint-

iff in the suit for the foreclosure of said mortgage, met Franklin C. Cornell, the plaintiff in said action, and William L. Burt, one of the defendants therein, at the office of Henry W. Poor, in the city of New York; that thereupon, under instructions which deponent had theretofore received from the said Henry Seymour King, he expressly notified the plaintiff
91 and the said Burt that in case the firm of Henry S. King & Co. should purchase, either directly or indirectly, or should direct the purchase of the mortgaged premises, or any part thereof, at the sale thereof to take place on the said 30th day of April, 1878, under the decree of foreclosure in said foreclosure suit, any such purchase would be for their own account and subject to their own directions, and the property purchased would be held and disposed of as they should see fit without any trust or obligation of any kind in favor of the plaintiff or said Burt, or any other person or party in respect thereto, or in respect to any acts or proceedings of any new company which might be thereafter formed to own and operate the same, and that the plaintiff, as well as the said Burt, must themselves protect at such sale any interest which they or either of them had or claimed to have in, to, or in respect to the mortgaged premises or any part thereof; and the said Sidney T. Fairchild, the attorney for the plaintiff in such foreclosure suit, then and there expressly offered to the plaintiff herein, and to the said Burt, an adjournment of the sale of the said mortgaged premises under the judgment in such foreclosure suit, from the time at which such sale had been advertised, if he desired further time in order to enable him to make any further arrangements in respect to the protection of his interests or alleged interests in, to, or in respect to such premises, but the said plaintiff, as well as the said Burt, expressly stated that he desired no adjournment of said sale for any such purpose, and thereafter and on the following day, to wit, the 30th day of April, 1878, the said mortgaged premises were sold under the said decree; that the said plaintiff was present at such sale and made no objection thereto, and that thereafter the sale of said premises was confirmed by the court in which such foreclosure suit was pending, without objection from the plaintiff in this suit or any opposition on his part to such confirmation thereof.

And deponent further says that the said plaintiff has not, nor has the said Burt, so far as deponent has any knowledge or information
92 upon the subject, and as he verily believes, ever tendered or offered to pay to said Henry S. King & Co., or the survivor of said firm, or to the defendant The Utica, Ithaca and Elmira Railway Company, a ratable or any proportion of the expenses of the purchase of the said mortgaged premises or connected therewith, or of the expenses of the organization, equipment, and operation of the said railway company, or so far as deponent has any knowledge or information and as he verily believes ever tendered or offered to deliver to said Henry S. King & Company, or the survivor of said firm, or said Utica, Ithaca and Elmira Railroad Company, any bonds of said Utica, Ithaca and Elmira Railway Company in exchange for bonds of said Utica, Ithaca and Elmira Railway Company, or for any other purpose whatsoever, and he avers that neither the plaintiff nor the said Burt have had more than a few, if any, of such bonds, which they could have so tendered, even if they had seen fit to tender the same.

And deponent further says that heretofore, and on or about the eighth day of October, 1880, the board of directors of the said Utica, Ithaca and

Elmira Railway Company met pursuant to call at the office of said company, in Elmira, in the State of New York; that thereupon resolutions were duly passed by the said board, authorizing the execution of an indenture of mortgage or deed of trust to John Paton and John B. Dumont, to secure the issue of bonds of the said railway company to the amount, at their par or face value, of six hundred thousand dollars, and authorizing the issue of such bonds; that thereupon such mortgage was duly executed on behalf of such company, and the same was thereupon, as deponent is informed and believes, duly registered in the counties where the mortgaged premises, in said indenture of mortgage or deed of trust, were and are situated, and that thereupon such bonds and each and all thereof having been countersigned by the trustees named in said indenture of mortgage or deed of trust, were duly issued and negotiated by and on behalf of said
93 company, and that all of the said bonds have been duly negotiated by said company, and none thereof remain in any wise in the possession or under the control of said company.

And deponent further says, that such bonds were not executed secretly or surreptitiously, or unlawfully, or without legal authority therefor, and that (if the place of affixing the seal of the company is in any wise material thereto) the seal of the said company was not affixed to such bonds in Canada or elsewhere than within the city, county, and State of New York.

And deponent further says, that he has not the possession or control in any wise of any bonds of the said railway company, but the same have all been negotiated to bona fide purchasers thereof for value, and the same are in the hands of divers persons and parties owning and holding the same, and that among such owners and holders, as deponent is informed and verily believes, are the firm of Morton, Bliss & Co., of New York, and Morton, Rose & Co., of London, and divers other persons and parties in London, in England, who have become owners and holders of the said bonds in various amounts.

And deponent further says, that it is true that after the incorporation of the said Utica, Ithaca and Elmira Railway Company, nineteen thousand six hundred and eighty shares of the capital stock of said company were placed in the name of this deponent, and that this deponent originally held the same for the account of the firm of Henry S. King & Co., of London, in England, but deponent says that he long since ceased to hold said stock for the account of the said Henry S. King & Co., who, prior to the first day of May, 1880, transferred their interest therein to other persons, who have since held the same, and that the certificates for such shares of stock are not under deponent's control, but are, as deponent is informed and believes, under the control of the persons to whom the former interest of said Henry S. King & Co. therein was transferred as above stated.

And deponent further says, that there has been no purpose or
94 intention in anything which has been done or contemplated in or about or in connection with the said Utica, Ithaca and Elmira Railway Company, or the said bonds thereof, or the mortgage securing the same, or the execution of such bonds or mortgage, or the negotiation of such bonds, or the dealings and transactions which have taken place in respect to the stock of said company or otherwise, in or about or in con-

nection with any of the affairs of the said company, which was intended to injure, impair, or affect any rights which the plaintiff might have under any alleged or pretended agreement which is claimed to have been entered into between the said plaintiff and the firm of Henry S. King & Co., or for the purpose of rendering any judgment that the plaintiff may obtain in this action ineffectual or of no avail, or of otherwise injuriously affecting any right, or alleged or pretended right of the plaintiff, but that all such acts and things have been done simply in the ordinary course of the business of the management of the affairs of the said railway company, in order to promote the best interests of such company, and to secure to the persons who had become, by the negotiation thereof to them, owners of the said bonds and the said stock, such rights as lawfully appertained to such ownership thereof and their consequent interests in the property of the said railway company.

And deponent further says, that during the three months or thereabout during which the railroad of the Utica, Ithaca and Elmira Railroad was in the hands of the receiver appointed to take possession and run and operate the same under the receivership order of 4th February, 1878, in the said foreclosure suit, the expenses of and connected with the operation of such railroad under said receivership were about thirty thousand dollars in excess of the gross earnings thereof, such railroad having been thus run at an average loss of about ten thousand dollars per month prior to the time of the foreclosure sale above referred to, and that since the time of the purchase thereof at such foreclosure sale and the organization of the Utica, Ithaca and Elmira Railroad Company to own and
95 operate the said railroad, the expenses of the operation of said railroad have exceeded the amount of its gross earnings by about the sum of one hundred thousand dollars, besides additional indebtedness incurred for rolling stock for use upon said railroad, being an annual loss, disregarding the expenses of such rolling stock, of something like fifty thousand dollars per annum.

GEO. J. RICE.

Sworn to before me this 16th day of March, 1881.
[SEAL.] EUGENE E. OUDIN,
Notary Public, New York County.

96 Supreme court, Tompkins County.

FRANKLIN C. CORNELL, AS ADMINISTRATOR OF the goods, chattels, and credits of Ezra Cornell, deceased,
against
THE UTICA, ITHACA AND ELMIRA RAILROAD Company and others.

CITY AND COUNTY OF NEW YORK, *ss:*

Charles H. Tweed, being duly sworn, deposes and says that he is one of the attorneys for the defendant Henry Seymour King in the above-entitled action; that heretofore and on or about the 29th day of April, 1878, the said Henry Seymour King called upon deponent at his office in the

city of New York in reference to the sale about to take place of the mortgaged premises and property under the decree of foreclosure of the mortgage of the Utica, Ithaca and Elmira Railroad Company; that among other things the said King stated to deponent that he had learned that George J. Rice had written and sent to the plaintiff some letter in respect to the said plaintiff's sharing for his bonds as the firm of Henry S. King & Co. were to share for theirs, which letter, the said King stated to deponent was not authorized or assented to by him or by his said firm of Henry S. King & Co., and that the said King desired if he should purchase the property to be sold at such sale, to purchase the same free and clear of all trusts and obligations in respect thereto;
97 that deponent thereupon advised the said King that he should cause the said plaintiff to be forthwith notified of that fact, and as the time fixed for such sale was near at hand, that Sidney T. Fairchild, who was the attorney for the plaintiff in such foreclosure suit, should also inform the said plaintiff that if he desired an adjournment of such sale in order to enable him to protect any interests that he claimed in respect to the property, that the same should be postponed accordingly; that thereafter the said King left deponent's office for the purpose of causing such notification to be given to the plaintiff, and that afterwards, on the 30th day of April, 1878, and before the sale of such mortgaged premises, under such decree, deponent was informed by the said King and the said Fairchild that such notification had been given to the said plaintiff, but that the plaintiff did not desire an adjournment of such sale. And further deponent saith not.

C. H. TWEED.

Sworn to before me this 17th day of March, 1881.

WM. CARY SANGER,
Notary Public, Kings Co., with cert. in N. Y. Co.

98 Supreme court, Tompkins County.

FRANKLIN C. CORNELL, AS ADMINISTRATOR OF the goods, chattels, and credits of Ezra Cornell, deceased,

against

THE UTICA, ITHACA AND ELMIRA RAILROAD Company and others.

CITY AND COUNTY OF NEW YORK, *ss:*

Sidney T. Fairchild, being sworn, deposes and says as follows: I have read the affidavit of Henry Seymour King in the action above entitled, which is hereto annexed, and was present at the interview therein described. At said interview George J. Rice notified those present that the sale to take place would be absolute, and that after said sale the purchaser of the property sold would hold it as his own, absolutely, free and clear of any trust or obligation in favor of any one else, and that persons interested in the bonds secured by the mortgage foreclosed must attend said sale and protect their interests. Deponent then and there informed those present that if any of them desired an adjournment for the purpose of protecting their

interest at such sale the sale would be adjourned; no one asked for an adjournment; the sale took place on the next day; I was present at the sale,
so was the plaintiff in the action above entitled and the said Burt;
99, 100 the said plaintiff made no objection to the sale, and the sale was duly confirmed by the court upon regular notice.

S. T. FAIRCHILD.

Sworn to before me this 17th day of March, 1881.

WM. CARY SANGER,
Notary Public, Kings County, with cert. in N. Y. Co.

101 Supreme court, Tompkins County.

FRANKLIN C. CORNELL, AS ADMINISTRATOR OF the goods, chattels, and credits of Ezra Cornell, deceased,
against
THE UTICA, ITHACA AND ELMIRA RAILROAD Company et al.

STATE OF CONNECTICUT,
City and County of New Haven, ss:

Henry Seymour King, being duly sworn, deposes and says, that he has seen the copies sent to Mr. Tweed of the affidavits in the above-entitled action, sworn to by Franklin C. Cornell, on the 18th day of March, 1881, and by Joseph Rodbourn, on the 19th day of March, 1881, respectively.

That it is true according to the best of deponent's recollection upon the subject; that on the evening preceding the day on which the Utica, Ithaca and Elmira Railroad was sold, under the decree of foreclos-
102 ure of the first mortgage thereon, deponent and George J. Rice and Franklin C. Cornell and Joseph Rodbourn dined together, and subsequently spent the evening together at the St. James Hotel in the city of New York, where deponent and said Rice were then staying, and where, as he verily believes, said Cornell and Rodbourn were also staying; but he denies that during that evening or at any other time he told the said Franklin C. Cornell that any agreement which he had made with George J. Rice was all right, or that if deponent bid the road in upon the sale the next day he would give the said Cornell new bonds for the old bonds which said Cornell held or was entitled to against the Utica, Ithaca & Elmira Railroad, or made any such or similar statement to or agreement with said Cornell.

And deponent further says, that as already stated in his previous affidavit herein, on such day preceding such sale, under the instructions of his counsel, Mr. Tweed, he caused express notice to be given to the said Franklin C. Cornell that if the said railroad was purchased by or on behalf of deponent or his firm it would be purchased without any trust or obligation whatsoever on his part or on the part of his firm in respect thereto, and that the said Cornell must protect any interest that he had or claimed to have therein; and at such time the attorney for the plaintiff in said foreclosure suit expressly gave notice to the said Cornell that if he desired the adjournment of such sale, in order to enable him to protect any interests

which he had or claimed to have therein, the sale would be adjourned. And deponent says that the notification so given on his behalf to the said Cornell on the day preceding the sale was never in any wise withdrawn or waived, nor did deponent ever say to said Cornell, or authorize any one else to say to him, that such notice so given to him as aforesaid did not or should not apply to the said Cornell as well as to the other parties having or claiming to have any interests in said property who were present at the time when such notification was given, and deponent here reasserts
103 the statements contained in the affidavit heretofore sworn to by him, and also in the affidavits heretofore sworn to in this action by George J. Rice and Sidney T. Fairchild, that the said Fairchild did expressly offer to adjourn the sale of said road upon account of the plaintiff if he desired such adjournment, and that such offer was made at the office of Henry W. Poor, in the city of New York, on the day preceding the sale, as averred in deponent's said former affidavit.

And deponent further says, that he cannot make affidavit as to what ideas or beliefs the said plaintiff may have had at the time of the sale or at any other time, but that the fact is that the plaintiff was expressly notified on the day preceding such sale that he must himself protect any interest which he had or claimed to have in respect to such property, and that if the property was bought by or on behalf of this deponent or his said firm it would be bought for their own account, and would not be subject to any trust or obligation in favor of the plaintiff or any other party, and that deponent is not in any wise responsible for any ideas or beliefs which the plaintiff may have entertained which were contrary to the express notification which deponent caused to be given to him as hereinbefore and in his former affidavit stated.

And the deponent, in answer to the said affidavit of Joseph Rodbourn, denies that he told the said Rodbourn or the plaintiff at any such conversation as is in said affidavit referred to, or at any other conversation, that any agreements which had been made by Mr. George J. Rice with the said Rodbourn or with the plaintiff, were all right, or that if they permitted him to bid the road in, or if he did bid the road in for the sum of fifty thousand dollars or any other sum he would settle with said Rodbourn and said plaintiff, and give them new bonds of the new organization of the road for the old bonds which they then held upon the old Utica, Ithaca, and Elmira Railroad, bond for bond, or that he made any such statements to, or agreements with said Rodbourn or said Cornell.

104 And deponent further says, that it is true as stated in said Rodbourn's affidavit, that at the office of Mr. Poor, in the city of New York, on the morning of the day before said sale, Mr. George J. Rice declared to those present that when the road was sold all persons must protect their own interests, but it is not true that it was well understood, or in any wise understood by the said Rice or deponent that said notice was not to apply to said Rodbourn, nor to the plaintiff, but on the contrary, it was well understood by both said Rice and deponent that the said notice was to, as it did, apply to the plaintiff, and said Rodbourn, and each of them, and such notice was expressly given for that purpose.

And deponent denies that either after or before this notice was given deponent declared to said Rodbourn, or the plaintiff, that any agreements

made by said Rice with them were all right, or that if they refrained from bidding at the sale they should have new bonds for old, and he denies that it was understood by said Rice, or deponent, that any notice that any persons having or claiming interests in said property must protect their own interests therein, was not to apply to the said Rodbourn or the plaintiff.

And deponent further says, that the notification given to the plaintiff, and the other parties present with him, at Mr. Poor's office the day before the sale, was given to them by deponent's direction in order that it might be clearly and distinctly understood by the plaintiff, and all parties there present, that neither he nor his firm were to be in any wise subject to any trust or obligation in respect to such property if the same was purchased by them or on their behalf, and in order that the plaintiff and such other parties might clearly and distinctly understand that they must themselves protect any interest which they had or claimed to have in, to, or in respect to the said property, and deponent never in any wise withdrew or waived or authorized the withdrawal or waiver of such notification, nor according to the best of deponent's knowledge, information, and belief upon the subject, was the same ever attempted to be withdrawn or waived by any
105 other person, but deponent avers, that after such notification was given the same remained as it has ever since remained, and still remains in full force and effect against both the said plaintiff and said Rodbourn.

H. S. KING.

STATE OF CONNECTICUT,
New Haven County, ss:

I, John C. Hollister, a commissioner for the State of New York, residing in the city and county of New Haven, in said State, do certify that on the 23d day of March, 1881, the above named H. S. King subscribed the foregoing affidavit in my presence, at said city, county, and State, and did depose and swear that the matters set forth therein were true.

JOHN C. HOLLISTER, [SEAL.]
A Commissioner for the State of New York.

STATE OF NEW YORK,
Office of the Secretary of State, ss:

I hereby certify that John C. Hollister, of New Haven, county of New Haven, and State of Connecticut, was, at the time of administering the oath or affirmation mentioned in his annexed certificate, a commissioner for the State of New York to take the proof and acknowledgment of deeds and other instruments to be used or recorded in this State, and to administer oaths and affirmations, and that such commissioner was at the time aforesaid duly authorized to take the same, and that I have compared the signature of the said commissioner to the certificate subjoined to the annexed instrument with the signature of such commissioner, deposited in this office, and have also compared the impression of the seal affixed to such certificate with the impression of the seal of such commissioner deposited in this office, and I verily believe the signature and impression of the seal to the said certificate to be genuine.

106 Witness my hand and the seal of office of the secretary of state,

at the city of Albany, this 25' day of March, in the year one thousand eight hundred and eighty-one.

[SEAL.]

JOSEPH B. CARR,
Secretary of State.

107 Supreme court, Tompkins County.

FRANKLIN C. CORNELL, AS ADMINISTRATOR OF the goods, chattels, and credits of Ezra Cornell, deceased,
against
THE UTICA, ITHACA AND ELMIRA RAILROAD Company et al.

CONSULATE OF THE UNITED STATES,
Montreal, Canada, ss:

Henry Seymour King, being duly sworn, deposes and says that hereunto annexed and marked Exhibit A is a copy of the complaint of one Joseph Rodbourn in a suit heretofore brought by said Rodbourn against deponent, and which is now pending in the supreme court for Chemung County, and that the twenty bonds which the said Rodbourn therein claims, were purchased from him by deponent on the thirtieth day of April, eighteen hundred and seventy-eight, are the only bonds of the Utica, Ithaca and Elmira Railroad Company which the said Rodbourn ever claimed or pretended to deponent that the said Rodbourn owned or was interested in.

H. S. KING.

Subscribed and sworn to before me this twenty-fourth day of March, 1881.

[SEAL.]

ORLANDO P. BLOSS,
U. S. Vice-Consul General.

108 *Exhibit A, referred to in annexed affidavit of Henry Seymour King.*

Supreme court, Chemung County.

JOSEPH RODBOURN
against
HENRY SEYMOUR KING, AS SURVIVOR OF HENRY S. King & Company.

The complaint of the plaintiff in this action respectfully shows to this court as follows, viz:

I. That in and during the years 1877 and 1878 one Henry Samuel King and the defendant in this action, Henry Seymour King, were copartners, and doing business as such, under the firm, name, and style of Henry S. King & Company; that in and during the years hereinbefore stated the said firm of Henry S. King & Company became indebted unto the plaintiff in this action for work, labor, and services rendered and performed by plaintiff for said firm of Henry S. King & Company, and at their request, in superintending the construction of the Cazenovia,

Canastota & De Ruyter Railway in the amount of six thousand dollars, and for which said firm promised to pay the plaintiff, but have neglected and refused so to do, and no part thereof has been paid.

109 II. And further complaining, and for a further and separate cause of action against the defendant in this action, the plaintiff alleges:

That during the time and times in the first count in this complaint stated the defendant herein and Henry Samuel King were partners, and doing business as such under the firm-name and style of "Henry S. King & Company," as set out in said first count of this complaint.

That on the 30th day of April, 1878, the plaintiff in this action was the owner and in possession of twenty bonds of the Utica, Ithaca and Elmira Railroad Company, a corporation duly chartered and created under and by virtue of the laws of the State of New York, of one thousand dollars each.

That on the day and date last aforesaid the plaintiff in this action sold and delivered said bonds to the said firm of Henry S. King & Company for the sum of eighteen thousand dollars, which amount the said firm of Henry S. King & Company promised to pay the plaintiff therefor, but have neglected so to do, and no part thereof has been paid. That thereafter, and subsequently to all the transactions mentioned in this complaint, the said Henry Samuel King departed this life, leaving Henry Seymour King, the defendant in this action, the sole survivor of said firm.

Wherefore the plaintiff demands judgment against the defendant in this action for the sum of twenty-four thousand dollars, with interest on six thousand dollars thereof from the first day of January, 1879, and interest on the balance of eighteen thousand dollars from the 30th day of April, 1878, besides the costs of this action.

(Signed) DAILY & BENTLEY,
Plaintiff's Attorneys, Horseheads, New York.

STATE OF NEW YORK,
Chemung County, ss:

Joseph Rodbourn, of said county, being duly sworn, says he is the plaintiff in this action; that the foregoing complaint is true of his
110 own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

(Signed) JOSEPH RODBOURN.

Subscribed and sworn to before me this 17th day of February, A. D. 1881.

(Signed) GEO. S. SADLER,
Notary Public in and for said County of Chemung.

111 Supreme court Tompkins County.

FRANKLIN C. CORNELL, AS ADMINISTRATOR of the goods, chattels, and credits of Ezra Cornell, deceased,

against

THE UTICA, ITHACA AND ELMIRA RAILROAD Company et al.

STATE OF CONNECTICUT,

City and County of New Haven, ss:

George J. Rice, being duly sworn, deposes and says that on the evening preceding the day on which the Utica, Ithaca and Elmira Raiload was sold under the decree of foreclosure of the first mortgage theron deponent and Henry Seymour King, Franklin C. Cornell, and Joseph Rodbourn dined together and subsequently spent thé evening together at the St. James Hotel in the city of New York, where deponent and said King and said Cornell and Rodbourn were staying, and he avers that he was present at and heard such conversations as took place during that evening between said King and said Cornell and said Rodbourn, but he denies that during that evening, or to the best of his knowledge, information, and belief at any other time, the said King told the said Franklin C. Cornell that any agreement which the said Cornell had made with deponent was all right, or that if the said King bid the road in upon the sale the next day, the said King would give the said Cornell new bonds for any old bonds which said Cornell held or was entitled to against the Utica, Ithaca and Elmira Rail-

112 road, or made any such or similar statement to or agreement with said Cornell.

And deponent further says that the notification given by him to the said Cornell under instructions from the said King on the day preceding the sale was not in any wise withdrawn or waived by said King or deponent on that evening, nor to the best of deponent's knowledge, information, and belief was the same ever withdrawn or waived, nor did the said King or deponent say to said Cornell on that evening, nor did deponent, or to the best of his knowledge, information, and belief the said King, at any time say to said Cornell that such notice so given to him as aforesaid did not or should not apply to the said Cornell, as well as to the other parties having or claiming to have any interest in the property, who were present at the time when such notification was given, and deponent here reasserts the statements contained in the affidavit formerly sworn to by him in this action on the 17th day of March, 1881.

And deponent further says that he cannot make affidavit as to what ideas or beliefs the plaintiff may have had at the time of the sale, or at any other time, but the fact is that the plaintiff was expressly notified on the day preceding such sale that he must himself protect any interest which he had or claimed to have in respect to such property, and that if the property was bought by or on behalf of the said King or his firm, it would be bought for their own account, and would not be subject to any trust or obligation in favor of the plaintiff or any other party, and that such notice was never withdrawn or waived, to the best of deponent's knowledge, information, and belief upon the subject.

And deponent denies that the said King, during the said evening, or to the best of deponent's knowledge, information, and belief at any other time, told Joseph Rodbourn or the plaintiff that any agreements which had been made by deponent with said Rodbourn or the plaintiff were all right, or that if they permitted the said King to bid the road in,
113 or that if he did bid the road in for the sum of fifty thousand dollars or any other sum, that the said King would settle with the said Rodbourn and the said plaintiff, and give them new bonds of the new organization of the road for the old bonds which they then held in the old Utica, Ithaca and Elmira Railroad, bond for bond, or made any such statement to or agreement with said Rodbourn or said Cornell.

And deponent further says, that it was not in any wise understood by deponent or by the said King that the notification given by deponent on the day preceding such sale was not to apply to said Rodburn nor to the plaintiff, but on the contrary he avers that it was well understood by deponent, and by the said King, that the said notice was to as it did apply to the plaintiff and said Rodburn and each of them, and such notice was expressly given for that purpose.

And deponent, upon the best of his knowledge and information upon the subject, and as he verily believes, denies that either after or before this notice was given the said King declared to said Rodbourn or to the plaintiff that any agreements made by deponent with them were all right, or if they refrained from bidding at the sale they should have new bonds for old, and he denies that it was understood by deponent or by the said King that any notice that any persons having or claiming interests in said property must protect their own interests therein was not to apply to said Rodbourn or the plaintiff.

And deponent further avers, that after such notification was given as above stated, the same remained, as it has ever since remained, and still remains in full force and effect against both the said plaintiff and the said Rodbourn.

And further deponent saith not.

GEO. J. RICE.

STATE OF CONNECTICUT,
New Haven County, ss:

I, John C. Hollister, a commissioner for the State of New York,
114, 115 residing at the city and county of New Haven, State of Connecticut, do certify that on this 23d day of March, 1881, George J. Rice subscribed the foregoing affidavit in my presence, at said city, county, and State, and did depose and swear that the matters set forth therein were true.

JOHN C. HOLLISTER, [L. S.]
A Commissioner for the State of New York.

STATE OF NEW YORK,
Office of the Secretary of State, ss:

I hereby certify that John C. Hollister, of New Haven, county of New Haven and State of Connecticut, was, at the time of administering the oath or affirmation mentioned in his annexed certificate, a commissioner for the State of New York, to take the proof and acknowledgment of deeds and

other instruments to be used or recorded in this State, and to administer oaths and affirmations; and that such commissioner was, at the time aforesaid, duly authorized to take the same; and that I have compared the signature of said commissioner to the certificate subjoined to the annexed instrument with the signature of such commissioner deposited in this office, and have also compared the impression of the seal affixed to such certificate with the impression of the seal of such commissioner deposited in this office, and I verily believe the signature and impression of the seal to the said certificate to be genuine.

Witness my hand and the seal of office of the secretary of state at the city of Albany, this 25th day of March, in the year one thousand eight hundred and eighty-one.

[L. S.] JOSEPH B. CARR,
Secretary of State.

116 Supreme court, Tompkins County.

FRANKLIN C. CORNELL, AS ADMINISTRATOR OF the goods, chattels, and credits of Ezra Cornell, deceased,
against
THE UTICA, ITHACA AND ELMIRA RAILROAD Company, The Utica, Ithaca and Elmira Railway Company, Henry V. Poor, Thomas N. Rooker, William L. Burt, John Greenough, Henry W. Poor, Joseph Redbourn, Henry Samuel King, Henry Seymour King, and Enos Wilder.

Notice is hereby given that an action has been commenced and is now pending in this court upon a complaint of the above-named plaintiff against the above-named defendants, to compel the defendant The Utica, Ithaca and Elmira Railway Company to issue to the plaintiffs its bonds secured by a mortgage upon the property hereinafter described to an amount equal to the bonds of its predecessor owned by the plaintiff, and to enforce an equitable lien upon the property of said company to the amount of such bonds, and that the premises in the last-mentioned county affected by the said action were at the time of the commencement of this action and at the time of filing this notice partly situated in the last-mentioned county, and are described as follows, to wit: All and singular the estate and property, real and personal and mixed, and all and singular the railroads or railways of the Utica, Ithaca and Elmira Railway Company construct-
117 ed, in process of construction, or hereafter to be constructed in the State of New York, and extending from Elmira, in the county of Chemung, through said county and the counties of Tioga, Tompkins, and Cortland to the village of Cortland, in the last-named county, together with all and singular the lands, tracks, lines, rails purchased or to be purchased, bridges, viaducts, culverts, ways, rights of ways, and materials, buildings, erections, fence walls, fixtures, privileges, easements, rights under leases, agreements, covenants, and contracts of all and every kind, franchises and rights and interests, real estate, personal property, choses in ac-

tion, leasehold, and other things of and belonging to said railway company of every kind, nature, and character whatsoever, and all railroad stations and depots, engine-houses and machine-shops, with all the appurtenances necessary or convenient for the sole, complete, and entire use and operation as well as maintenance of the said railroad owned by the said railway company; and also all the locomotives, engines, tenders, cars of every kind, carriages, rolling-stock, material, tools, and machinery now owned or hereafter to be acquired by or belonging or appertaining to said railroad and connected with the proper equipment, operation, and conduct of the same; all of which personal chattels have been declared and agreed to be fixtures and appurtenances of the said railroad, and are to be used and sold therewith and not separate therefrom, and are to be taken as a part thereof; and all tolls, incomes, issues, and profits to be had or derived from the same or any part or portion thereof, and all rights to receive or recover the same, and together with all improvements or additions made or to be made to any or all of the said properties, estates, railroad and its appurtenances by said company, or by others; and also all and every other estate, interest, property, or thing which the said railroad company owns and holds or may and shall hereafter acquire and hold necessary or
118 convenient for the use, occupation, operation, or enjoyment of its said railroad leases and property, rights, privileges, and franchises, or any part or portion thereof; and also all rights and privileges to use the said road-bed, track, sidings, turnouts, and switches constructed for the convenient use of said railroad, owned and operated by the said railway company.

F. M. FINCH,
Plaintiff's Attorney, Ithaca, N. Y.

Index the name of all the defendants.

F. M. FINCH,
Plaintiff's Attorney.

Filed and recorded October 9th, 1879, at 3.45 p. m. O. P. Hyde, clerk. In No. 4, Pendency of Actions, at page 34, &c.

STATE OF NEW YORK,
Tompkins County, Clerk's Office, ss:

I, Squire B. Rolfe, clerk of said county, do certify that I have compared the foregoing with the original now on file and record in said office, and do certify that it is a correct transcript therefrom, and of the whole of said original.

In testimony whereof I have hereunto subscribed my name and affixed the official seal of said county, at Ithaca, this 18th day of March, A. D. 1881.

[L. S.] E. A. MARSH,
Dept. Clerk.

119 At a special term of the supreme court, held at chambers, in Ithaca, in the county of Tompkins, on the 25th day of April, 1881.

Present, Hon. D. Boardman, justice.

FRANKLIN C. CORNELL, AS ADMINISTRATOR OF the goods, chattels, and credits of Ezra Cornell, deceased,

against

THE UTICA, ITHACA AND ELMIRA RAILROAD Company and others.

Upon reading and filing the complaint in the above-entitled action, and the affidavit of Franklin C. Cornell therein sworn to, on the 24th day of November, 1880, and the order to show cause and injunction order, bearing date the 27th day of November, 1880, and the affidavit of Samuel H. Wilcox, sworn to on the 15th day of December, 1880, and the order to show cause and injunction order, bearing date the 15th day of December, 1880, and the affidavit of Franklin C. Cornell, sworn to on the 17th day of February, 1881, and the order to show cause and injunction order made by Mr. Justice Boardman thereon, and the affidavit of Franklin C. Cornell sworn to on the 18th day of March, 1881, and the affidavit of Joseph Rodbourn, sworn to on the 19th day of March, 1881, and the two undertakings on procuring injunction each in the amount of five hundred dollars, heretofore filed on behalf of the plaintiff herein, and upon reading and filing the amended answer of the defendant Henry Seymour King, sworn to on the 17th day of March, 1881, and the affidavit of Henry Seymour King, sworn to on the 17th day of March, 1881, and the
120 affidavit of George J. Rice, sworn to on the 16th day of March, 1881, and the affidavit of Charles H. Tweed, sworn to on the 17th day of March, 1881, and the affidavit of Sidney T. Fairchild, sworn to on the 17th day of March, 1881, and the further affidavits of Henry Seymour King, sworn to on the 23d and 24th days of March, 1881, respectively, and the further affidavit of George J. Rice, sworn to on the 23d day of March, 1881, and the copies of the complaint in said action, and the notices of the pendency of this action, heretofore filed, and after hearing Irving G. Vann and Samuel H. Wilcox, esquires, of counsel for the plaintiff, in favor of the applications for injunctions under said respective orders to show cause, and Samuel Hand, George M. Diven, and Charles H. Tweed, esquires, of counsel for the defendants King and the Utica, Ithaca and Elmira Railway Company, in opposition thereto, and in opposition to the injunction orders heretofore granted in said action, and after due deliberation had thereon, and upon motion of Samuel H. Wilcox, attorney for the plaintiff in said action, it is

Ordered, that, until the further order of the court, the Utica, Ithaca and Elmira Railway Company, its officers, agents, and attorneys, be, and they are hereby, enjoined and restrained from issuing or negotiating any bonds of the said The Utica, Ithaca and Elmira Railway Company, and from giving any mortgage upon the property, real or personal, or the franchises of the said Utica, Ithaca and Elmira Railway Company, and from paying or causing or permitting to be paid any part of either the principal or interest of any bonds heretofore issued or that may hereafter be issued by or on behalf of the said defendant. The Utica, Ithaca and Elmira Railway Company, and from furnishing and from permitting to be used any of its money, property, or assets for that purpose, and from paying out, using,

or in any way disposing of any money or other property or assets already received, or that may hereafter be received by the Utica, Ithaca
121 and Elmira Railway Company from the sale or negotiation or disposition of any bonds heretofore issued, or that may be hereafter issued, by the Utica, Ithaca and Elmira Railway Company, and from allowing, consenting to, or permitting any disposition whatever of any proceeds or any avails of any bonds of the Utica, Ithaca and Elmira Railway Company heretofore issued or that may be hereafter issued, and that until the further order of the court the defendant Henry Seymour King, both individually and as survivor of the firm of Henry S. King & Co., his attorneys, counsellors, employés, and agents, and especially his agent George J. Rice, be, and they are hereby, enjoined and restrained from selling, transferring, or in any way disposing of any bonds or obligations in the form of railroad bonds of the said defendant The Utica, Ithaca and Elmira Railway Company (which the said King, either individually or as survivor of the firm of Henry S. King & Co., owns or has title to in whole or in part) that may now be in the possession of or under the control of the said defendant King, either as an individual or as survivor of the firm of Henry S. King & Co., or in the possession of or under the control of any attorney, counsellor, employé, or agent of said Henry Seymour King, as an individual or as such survivor, and from receiving, accepting, or taking into his possession from the said George J. Rice, or from any source whatever, any of the stock of the said defendant The Utica, Ithaca and Elmira Railway Company, and from negotiating, transferring, or in any way disposing of any of said stock that may now be in the possession or under the control of the said Henry Seymour King, individually or as such survivor, or that shall at any time hereafter come into the possession or under the control of the said Henry Seymour King, either individually or as such survivor.

And upon the settlement of the foregoing injunction order, the counsel for the defendant King and for the defendant The Utica, Ithaca and Elmira Railway Company, having applied to the court on behalf of each of
122 such defendants to qualify the said injunction order so far as it enjoins the said railway company, its officers, attorneys, and agents from paying, or causing or permitting to be paid, any part of either the principal or interest of any bonds heretofore issued, and from furnishing and from permitting to be used any of its money, property, or assets, for that purpose, by excepting from the operation of such clause of said injunction order bonds in the hands of bona fide holders thereof for value, it is

Ordered, that such applications on behalf of each of the said defendants be, and the same are hereby, denied.

And upon the settlement of the foregoing injunction order the counsel for the said defendant King and for the said defendant The Utica, Ithaca and Elmira Railway Company, having applied to the court on behalf of each of such defendants to require the plaintiff, as a condition of the granting or continuance of such injunction order, to increase the amount of the security to be given by the plaintiff upon the granting or continuance of such injunction order to an amount which shall afford adequate security to the said defendant King and the said defendant The Utica, Ithaca and

Elmira Railway Company, and each of them, if the court shall finally decide that the plaintiff is not entitled thereto,

It is further ordered that the applications of the said defendants, and each of them, for further security upon the granting or continuance of such injunction, beyond the amount already given as aforesaid, be and the same is hereby denied, without prejudice to the right of the defendants to apply to the court for further security upon notice to the plaintiff.

D. BOARDMAN,
Justice Supreme Court.

123 Supreme court, Tompkins County.

FRANKLIN C. CORNELL, AS ADMINISTRATOR OF the goods, chattels, and credits of Ezra Cornell, deceased,

against

THE UTICA, ITHACA AND ELMIRA RAILWAY Company, impleaded with the Utica, Ithaca and Elmira Railroad Company and others.

Take notice that the Utica, Ithaca and Elmira Railway Company, one of the defendants in the above-entitled action, hereby appeals to the general term of this court from the order for an injunction, and denying certain applications of the said defendant in the above-entitled action, this day made and entered in said action, and from each and every part of the said order.

New York, April 25, 1881.

Yours, &c.,

CHARLES H. TWEED,
Attorney for Defendant, Utica, Ithaca and Elmira Raiway Company.

To S. H. WILCOX, Esq.,
Plaintiff's Attorney, &
" CLERK of Tompkins County.

124 Supreme court, Tompkins County.

FRANKLIN C. CORNELL, AS ADMINISTRATOR OF the goods, chattels, and credits of Ezra Cornell, deceased,

against

HENRY SEYMOUR KING, IMPLEADED WITH THE Utica, Ithaca and Elmira Railroad Company and others.

Take notice that Henry Seymour King, one of the defendants in the above-entitled action, hereby appeals to the general term of this court from the order for an injunction, and denying certain applications of the said

defendant in the above-entitled action, this day made and entered in said action, and from each and every part of the said order.

New York, April 25, 1881.

Yours, &c.,

EVARTS, SOUTHMAYD & CHOATE.
Attorneys for Defendant Henry Seymour King.

To S. H. WILCOX,
Plaintiff's Attorney, &
" CLERK of Tompkins County.

125 Tompkins special term, March, 1881.

FRANKLIN C. CORNELL, AD'R, &C.,
vs.
UTICA, ITHACA AND ELMIRA R. R. CO. ET AL.

Motion for continuance of preliminary injunction, pendente lite.

Irving Vann, for the motion.
Samuel Hand and Charles H. Tweed, opposed.

BOARDMAN, J.

Ezra Cornell, plaintiff's intestate, was the contractor for the building of a portion of the Utica, Ithaca and Elmira Railroad. He was paid in the bonds and stock of said road, but as these were not available for sale in the open market he had borrowed large sums of money upon them as collateral. His efforts as a contractor were embarrassed for want of money, and by reason of his large indebtedness an arrangement was made whereby one Greenough, in the interests of the contractor and the owners of the road, went to England and secured the sale of the bonds of the road, the proceeds being first applied to the payment of Mr. Cornell's indebtedness, secured by said bonds. Afterwards certain other payments were to be paid out of the proceeds of bonds sold, including a considerable amount to Cornell. Henry S. King & Co., of London, were the bankers through whom the sales of bonds in England were made. Afterwards, the interest upon these bonds not being paid, the mortgage given to secure the same was foreclosed. At the time of the sale said H. S. King & Co., or their survivor, owned or controlled, as if owners, some 946 bonds of $1,000 each. The plaintiff owned, or claimed to own, some
341 bonds of $1,000 each, and the remainder of an issue of
126 $1,365,000 was held and owned by various persons in small amounts. The title of the plaintiff to a portion of the bonds claimed by him is contested by some of the defendants in this action. If any of the bonds claimed by plaintiff have been sold, then plaintiff claims the proceeds thereof as belonging to him.

The sale of the road was made April 30, 1878, for the sum of $50,000, and was bid in by an agent of said H. S. King & Co., the plaintiff not bidding thereon.

The plaintiff alleges that prior to said sale it was agreed between King & Co. and plaintiff that said railroad should be bid in for the joint benefit

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New York, April 25, 1881.

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Attorneys for Defendant Henry Seymour King.

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" CLERK of Tompkins County.

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The plaintiff alleges that prior to said sale it was agreed between King & Co. and plaintiff that said railroad should be bid in for the joint benefit

of plaintiff and said King & Co., in proportion to their respective rights as owners and holders of said bonds; that as soon as the title should be perfected a new company should be organized which should execute a first mortgage upon said road and issue bonds of the new company to plaintiff and said King & Co. to the same extent and amount for which they were respectively owners and holders of bonds in the old road, and that in pursuance of such agreement the plaintiff abstained from bidding on said property, and King & Co. bought the same.

Afterwards a new company was formed by the name of the Utica, Ithaca and Elmira Railway Company, a defendant herein, and the title to the property transferred by the purchaser to it.

As the title and ownership of plaintiff to the number of shares claimed by him was controverted by some of the defendants, this action was brought in June, 1878, among other things, to have determined and adjudged the rights and interests of the several parties to this action, and to have enforced specifically by the Utica, Ithaca and Elmira Railway Company the contract or agreement under and by virtue of which H. S. King & Co. became the real purchasers of said railroad property upon the foreclosure sale April 30, 1878. The plaintiff claimed to have an equitable lien upon said railway property for the amount of his debt by virtue of said contract. A demurrer to the complaint was interposed by King, which was overruled at special and general terms, and an amended answer has, on the day when this motion is heard, been served.

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In November, 1880, an injunction was issued forbidding the U., I. & E. Railway Company from issuing bonds and securing their payment by a first mortgage upon its property in violation of plaintiff's equitable rights, it being alleged that such intention existed.

In December, 1880, upon allegation of information that a mortgage for $600,000 had been put upon said property by the railway company, and that the bonds were ready to issue, or had been taken by H. S. King, to England, to be issued, a further injunction was issued restraining the defendants from paying any part of the principal or interest of such bonds until the further order of this court.

In February, 1881, upon allegation that George Rice, the president of said railway company, was about to issue to King & Co. stock certificates to a large amount in said railway company, a third injunction was issued enjoining such issue of stock by the company to King & Co.

The hearing upon the application to continue these injunctions pending the litigation has, by consent, been deferred from time to time to this day.

The plaintiff claims to hold an equitable lien upon the property of the railway company which should be enforced and upheld in preference to stockholders or creditors of the new company, and that the various acts done or threatened by said company are calculated to destroy his rights or embarrass his remedy and imperil his security by the creation of new and hostile interests.

The defendant, King, denies that any agreement, as is claimed by plaintiff, was made with plaintiff before said foreclosure sale, and denies that the plaintiff had any interest in the property after the sale, either legal or equitable.

The defendant also insists that if any agreement was made, it was void in law, and within the statute of frauds, and was terminated by a formal notice that the sale would convey entire interest to the

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purchaser, absolutely free from any equities or liens whatsoever, and that the plaintiff and others must protect their own interests upon such sale.

The defendant alleges that whatever rights the plaintiff has, if any, are protected by his notice of the pendency of the action filed in this case; that two provisional remedies will not be granted by the courts at the same time, and the danger of injury to plaintiff from defendant's acts could not so exist as to justify these injunctions while the lis pendens gave constructive notice to all of plaintiff's rights. It is also claimed by defendants that the mortgage for $600,000 was put upon the property of the railway company and the bonds issued thereon to bona fide purchasers, prior to the issuing of the first injunction, which injunction is therefore futile and worthless, and that the third injunction is too broad in restraining King & Co. from disposing of any bonds in the possession or under the control of them or either of them, thus covering bonds in their possession to which they have no title, and in which they claim no interest.

It is agreed by counsel for the plaintiff, that the third injunction may be modified so as to affect only such bonds as the defendant, King, owns or has title to in whole or in part, and it is so modified.

The only issue of fact of importance in this case, relates to the alleged contract, under which the defendant bid in the railroad upon the foreclosure. If the plaintiff's witnesses tell the truth, the title taken on such sale was for the joint benefit of plaintiff and defendant King, according to their several interests. If the defendant's witnesses tell the truth, the plaintiff has not the shadow of a cause of action against King or the railway company and his complaint should be dismissed.

What the fact is remains in doubt, and this court ought not, if
129 it can fairly be avoided, to pass upon the merits in such a way as will, in effect, destroy the plaintiff's cause of action, and strip him of the relief to which a trial upon the merits might show him entitled. The plaintiff might be remediless without the aid of injunctions. The defendants are protected by adequate security for any loss they may sustain. Rector, etc., v. Keech, 5 Bosw., 691; Speer v. Cutter, 5 Barb., 486. Reference should be had to the nature and extent of the injury, to the consequences which may follow the granting or withholding the injunction. High on Inj., sec. 1136. Heath v. Pres't, etc., 7 Abb., N. S., 251; Bruce v. D. & H. Can. Co., 10 Barb., 371; Gallatin v. Oriental Bank, 16 How., 253. It is usually sufficient to establish a prima facie case entitling plaintiff to a specific performance of a contract. The result of the final hearing need not be shown to be necessarily in his favor. 2 High on Inj., sec. 1120, secs. 1121, 1122; 2 Wait's Prac., 3, 6, 8, 11, 12.

For the e reasons I shall not hold that the plaintiff has no cause of action, and is not, therefore, entitled to any protection. It is safer and wiser to assume, for the purposes of these motions, that the questions of fact may be determined upon trial in plaintiff's favor. In that event he might be robbed of his relief, if this court, on an interlocutory order, should dissolve the injunction by which his remedy is secured.

It is proper also to consider the facts that the defendant King, who is, and has been the principal and responsible actor in this transaction, is a resident of England; that the railway company, as at present organized, is not possessed of great value, as defendant charges, of not sufficient value to satisfy the claims of plaintiff and defendant King, in cash; that $600,000

have already been issued by the railway company in bonds, secured by a mortgage upon the road, as defendant asserts, to bona fide holders, who will, doubtless, claim priority over the plaintiff, though plaintiff may succeed; that said King claims now the stock of said road to nearly
130 two millions of dollars has been issued and disposed of by him to bona fide purchasers; that each bona fide purchaser of the stock, bonds, or property of said company may reasonably claim that they purchased in ignorance of plaintiff's alleged claim and lien, and that much of the property of said company may be transferred without the knowledge, and against the alleged rights of the plaintiff, who could, with extreme difficulty, follow the property, or protect his liens thereon, or against such sale or transfer thereof. Again, this action was begun in June, 1878. After the delay incident to a demurrer to the complaint, an amended answer is served in March, 1881, by the defendants; and yet, the only essential issue between plaintiff and the railway company and King is the alleged contract under which King bid in the old road, April 30, 1878. The evidence touching the existence of such contract is apparently confined to five or six persons at most, and could have been tried and disposed of at any time within the last two and one-half years if the defendants had desired to do so. In the mean time, and in defiance of plaintiff's alleged rights, they have, as they allege, mortgaged the road and issued its stock to purchasers in good faith, who will, doubtless, claim priority over any equitable lien of plaintiff upon the same property.

I have said the essential issue relates to the alleged contract on the foreclosure sale. That, I take it, is true; for if such contract is not found to have been made, that will be the end of plaintiff's case. If it shall be found to have been made, the defendant can, if the law so adjudge, easily comply by the issue of the requisite bonds, and the delivery of the same into court, so as to be absolved from all further litigation or embarrassment arising therefrom. One-half the time, labor, and expense applied to the litigation by demurrer, and to the effort to get rid of these injunctions, would have disposed of every question of fact at issue between plaintiff and defendants King and the railway company, and left only the entry
131 of such a judgment upon the merits as the law and the facts so determined should justify. It is not well to try a case by indirection, or upon affidavits, when as simple a mode lies in a trial upon the merits.

We shall assume, then, the contract as alleged by plaintiff for the purposes of this application, but without passing upon the merits or deciding anything as to the credibility of the witnesses whose affidavits have been read. That question is sent to the trial court, free from any expression of conviction by this court which can influence the judgment or affect the decision of the judge who shall try the case on its merits.

It is urged, however, that a contract, such as is alleged, would be void, 1st, as in violation of the statute of frauds, and 2d, as against public policy.

The statute of frauds does not apply to such a case as the present. Plaintiff and King had a joint interest and quasi ownership of the railroad company. Their contracts for the disposition of their property, carried into effect by virtue thereof, are valid and effectual. (Traphagan v. Burt, 67 N. Y., 30; Ryan v. Dox, 34 N. Y., 307.) The case is very different from Levy v. Bush, 45 Id., 589, where the plaintiff had parted with nothing

and done nothing to entitle him to enforce the contract. Here the plaintiff has parted with his interest in and claim upon the promise of King to repay him out of the proceeds of property that went into King's hands by virtue of the contract. It was a permission and agreement by plaintiff, that the defendant King might take possession and title to the property, discharged from plaintiff's lien, provided and upon the condition that defendant should restore the lien to plaintiff after his purchase. Such a transaction is not within the statute of frauds.

Nor is there anything in the transaction that should render it void out of consideration for public policy. The interests of these parties in the property to be sold were not diverse and hostile. The property
132 was being sold to pay their debts. Their interests were therefore in harmony, and they were equally interested in securing their debts by and through the sale. It was therefore no combination to suppress bidding at a judicial sale. Their relations were very like those of two partners under similar circumstances purchasing at a foreclosure. The agreement by one that he will buy for the benefit of both and the abstinence from bidding of the other by reason thereof, would not present a question of public policy. (Barne v. Drew, 4 Den., 287; Ingraham v. Baldwin, 12 Barb., 9, 21.)

It is further urged by the defendants that such a contract as is alleged by plaintiff could not be legally carried into effect by the new railway company, because it would thus execute a mortgage for an amount in excess of its entire value, and without receiving therefrom a dollar of consideration. This, it is insisted, no railroad company organized under the laws of this State has power to do.

Conceding these propositions true, they do not apply to the case under consideration. The railway company acquired the title that King purchased at the foreclosure, subject to any equitable rights of plaintiff. What has the railway company paid King or plaintiff for the road, franchises, &c.? The answer must be, nothing, unless the $600,000 in bonds and two millions in stock were issued to King to pay for the value of his interest in the property at the time of the foreclosure. If it was so paid, then plaintiff claims he also, under his contract, was entitled to be paid in like manner, and in proportion that his interest bore to King's. It is difficult to see how the railway company could pay King for his interest and could not pay plaintiff for his equitable interest in the same property in King's hand. (2 Wait' Pr., 47; Cranston v. Plumb, 54 Barb., 59.)

If on the contrary these bonds and stock certificates have been issued to actual purchasers and have been paid for in cash to the company, then it has paid nothing for all the property sold under the foreclosure and
133 transferred to it by King, or his order. Upon what principle can this railway company claim to hold and own a large and valuable property upon which plaintiff has, or claims an equitable lien, without having paid one dollar therefor? The lien that was to be given by the railway company to plaintiff and King by virtue of the contract was the consideration to be paid for the road, franchises, &c. It has either paid nothing, or it has paid only to King, ignoring and refusing to pay plaintiff's claim. Certainly, the statute does not create the right in newly organized railroads to refuse to pay the purchase price. There is, there can be no pretence that the railway company is not equally responsible with

King for the performance of any contract made with plaintiff by King as to the foreclosure. If the property in King's hands was charged with an equitable lien in favor of plaintiff, it is equally so in the hands of the railway company. To all legal intents, the two, King and the railway company, are one and the same, except, perhaps, to the extent that the purchasers in good faith of the bonds and stock of the railway company may have acquired rights prior to, but in fraud of plaintiff's lien. (Blatchford v. Ross, 54 Barb., 42; 2 Wait's Pr., 47.)

There is a further point raised by the defense, to wit, that an injunction will not be granted, or, if granted, will be set aside when a lis pendens already filed secures to the plaintiff all that the injunction has or is intended to secure to him.

The plaintiff replies to such claim that there is no proof of the filing of the notice in any county besides Tompkins, while the real estate and road-bed extend through the counties of Chemung, Tioga, and Cortland, as well as through Tompkins. There is no proof that the complaint in this action was filed in any one of said counties, not even in Tompkins; and hence a notice, if filed, would be inoperative. (Burrough v. Reiger, 12 How., 171; 48 N. Y., 585, old code, sec. 132.) For these reasons it cannot be safely assumed that the plaintiff's rights are protected
134 by the filing of a notice of the pendency of the action in the counties through which the road runs.

But we will disregard these answers of the plaintiff to the objection of the defendants, which answers may be more technical than real, and put our decision upon the broader ground that a lis pendens is not a full and complete protection to the rights of the plaintiff as claimed by him. His original mortgage not only covered the road-bed, but the personal property belonging to the old railroad company, and such real and personal property was sold and bid in by King on the foreclosure. All of the property so bid in was charged with any equities of the plaintiff under his contract with King. The lis pendens cannot protect plaintiff's rights in or to the personal property, which by the $600,000 mortgage has been included as a part of the mortgaged property. (Mills v. Bliss, 55 N. Y., 141.) In the respect just indicated the present case is distinguished from those cited by counsel for the defense. Besides, the stock certificates are not covered by the notice, and it may be a question whether persons acquiring certificates of stock in a corporation and paying value therefor without notice of plaintiff's equities, could be compelled to submit to them.

It is not, perhaps, necessary to question the authority of Osborne vs. Taylor, 5 Paige, 515, and others founded thereon, cited by the defendant. If the lis pendens protects the party filing it to the same extent and in as full a manner as an injunction would, it must be conceded that an injunction would be useless. Under such facts, an application for an injunction would be without merit.

But in the present case we have rights alleged to be founded upon latent equities against property, real and personal, in the hands of King. King transfers such property to a railway corporation, concealing plaintiff's equities and ignoring his rights. As the apparent owner of the property that is transferred to the corporation, he becomes the apparent
135, 136 owner of the stock of the railway company, and controlling its action. As such apparent owner, the stock is issued to him by the

officers of the road. At his dictation, and because he appears to have supreme authority and ownership, a mortgage for $600,000 is put upon the road, its iron, ties, equipment, and franchises, and the bonds issued thereon to him and disposed of by him at his pleasure. The stock has been or may be, in like manner, sold by King and transferred to others. Each day may add to the complication and difficulties in the way of securing an adjustment of plaintiff's rights, if he shall finally be adjudged to have any. Under such a state of facts, it would seem to be eminently just and proper for a court of equity to command a defendant to desist from disposing of the property alleged to be subject to an equitable lien in favor of the plaintiff until the rights of the plaintiff can be ascertained, and if determined in his favor, that the property may be found to satisfy his demands. The public are entitled to protection against the wrongful acts of persons in possession of corporate property, whereby they may lose their money paid for the purchase, or may be involved in complicated and fruitless litigation.

Whether or not the plaintiff was bound to tender a proportion of the expenses of the foreclosure sale and of his bonds and demand from King and the railway company a performance of their contract, does not seem to me a proper subject for consideration upon this motion. It will be best considered on the trial of the action.

For the reasons assigned, I think the injunctions heretofore granted should be continued pendente lite, except that the injunction enjoining the said King and others from selling, &c., any bonds, &c., of the railway company in the possession, &c., of the said King, should be so modified as to refer to and include only such bonds, &c., of the railway company, defendant, as were or are owned in whole or in part by the defendant, King, his agents, &c.

The form of the order, if necessary, to be settled by me.

137 At a general term of the supreme court held in and for the third judicial department, at the city and county of Albany, on the 23d day of November, 1881.

Present, Hon. William L. Learnes and Hon. Augustus Bockes.

FRANKLIN C. CORNELL, AS ADMINISTRATOR OF the goods, chattles, and credits of Ezra Cornell, deceased, respondent.

vs.

THE UTICA, ITHACA & ELMIRA RAILROAD COMPANY et al., appellants.

An appeal having been taken by the Utica, Ithaca & Elmira Railway Company and Henry Seymour King, two of the defendants in the above-entitled action, from an order made herein by the Tompkins special term, on the 25th day of April, 1881, granting an injunction in this
138 action and denying certain applications of the said defendant to the general term of this court, in and for the third judicial department thereof, and said appeal having been duly argued at a regular general term of this court, held in and for the said department at the village of Saratoga Springs, in the county of Saratoga, on the 16th day of September,

1881, by Hon. Samuel Hand for the appellants and Irving G. Vann for the respondents:

Now, therefore, after due deliberation, on motion of S. H. Wilcox, attorney for the respondents, it is

Ordered, that said orders of the Tompkins special term, made on the 25th day of April, 1881, and so appealed from, as aforesaid, be and the same is hereby in all things affirmed.

And, on like motion, it is further ordered that the said appellants pay to the said respondents the sum of ten dollars, costs of affirmance, with printing disbursement, to be taxed by the clerk of Tompkins County.

(Copy.)

JOHN LARKIN, *Clerk.*

Filed and entered Dec. 5th, 1881. S. B. Rolfe, clerk.

139 To the honorable the supreme court of the State of New York, in and for the county of Tompkins:

The petition of Henry Seymour King respectfully showeth that heretofore and on or about the twelfth day of February, 1879, a suit of a civil nature in equity was brought in this court by Franklin C. Cornell, as administrator of the goods, chattels, and credits of Ezra Cornell, deceased, against your petitioner, impleaded with the Utica, Ithaca & Elmira Railroad Company, the Utica, Ithaca & Elmira Railway Company, Henry V. Poor, Thomas N. Rooker, William L. Burt, John Greenough, Henry W. Poor, Joseph Rodbourn, Enos Wilder, and one Henry Samuel King, who was, however, then deceased; that the plaintiff at the time of the commencement of said suit was, and has ever since been, and now is a citizen of and resident in the State of New York, residing in Ithaca, in said State, and that Ezra Cornell, the intestate of said plaintiff, was, at and prior to the time of his death, also a citizen of and resident in said

140 State of New York, residing in Ithaca, in said State; that your petitioner was, at the time of commencement of said suit, and has ever since been and now is an alien and a subject of the Queen of the United Kingdom of Great Britain and Ireland, residing in London, in England; that the defendants, the Utica, Ithaca & Elmira Railroad Company, and the Utica, Ithaca & Elmira Railway Company were, at the time of the commencement of the said suit, and have ever since been and now are corporations created, organized, and existing under the laws of the State of New York, and citizens of the State of New York, having their principal offices in Elmira, in said State; that the defendants Thomas N. Rooker, John Greenough, Henry W. Poor, and Joseph Rodbourn, were, at the time of the commencement of said suit, and have ever since been and now are citizens of and residents in the said State of New York, the said Thomas N. Rooker residing in Brooklyn, in said State, the said John Greenough and Henry W. Poor residing in the city of New York, in said State, and the said Joseph Rodbourn residing in Breesport, in said

141 State; that the defendants, Henry V. Poor and William L. Burt, were, at the time of the commencement of said suit, and have ever since been and now are citizens of and residents in the State of Massachusetts, the said Henry V. Poor residing in Brookline, in said State, and the said William L. Burt residing in Boston, in said State; that the defend-

ant Enos Wilder was, at the time of the commencement of said suit, and has ever since been and now is a citizen of and resident in the State of New Jersey, residing in Madison, in said State; and that the defendant, Henry Samuel King, therein named, died before the time of the commencement of said suit, but at and prior to the time of his death was an alien and a subject of the Queen of the United Kingdom of Great Britain and Ireland, residing in London, in England; that the said suit was brought for the purpose of procuring judgment, among other things, that the plaintiff was entitled to have and receive from the firm of Henry
S. King & Company, of which at the time of the commencement
142 of said suit your petitioner was the sole surviving partner, an amount of new bonds of the railroad of the Utica, Ithaca & Elmira Railway Company, equivalent to plaintiff's alleged ownership in the bonds of the Utica, Ithaca & Elmira Railway Company, referred to in the alleged contract mentioned in the complaint in this action; that your petitioner denies that the plaintiff is entitled to any such relief, or to any relief in said suit; that said suit is a suit of a civil nature, in equity, in which there is a controversy between the plaintiff aforesaid, a citizen of the State of New York, and your petitioner who is an alien and foreign subject as hereinbefore alleged, and that it is a suit in which there can be a final determination of the controversy so far as concerns your petitioner without the presence of the other defendants as parties in the cause, and that the matter in dispute in said suit exceeds, exclusive of costs, the sum or value of five hundred dollars; that said suit is pending undetermined
in this court; that a demurrer on behalf of your petitioner has
143 been heretofore interposed, but has been overruled, and that your petitioner served his answer to the complaint of the plaintiff in said suit on the twenty-fourth day of September, 1880, and has to-day served his amended answer in said suit; that the said suit has never been noticed for trial, and that there has never been any trial or final hearing thereof, nor any term at which the same could be tried, and that no application has been heretofore made to any court or judge for the order to be applied for upon this petition.

Wherefore, your petitioner prays for the removal of the said suit into the circuit court of the United States, to be held in the district where such suit is pending, to wit, the circuit court of the United States for the northern district of New York, in the second circuit, and makes and files with this petition a bond, with good and sufficient surety, for his entering in such circuit court on the first day of its next session, a copy of the record in such
suit, and for paying all costs that may be awarded by said circuit
144 court if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for his there appearing and entering special bail in such suit, if special bail was originally requisite therein, and also offer good and sufficient surety for his entering in such circuit court, on the first day of its session, copies of all process, pleadings, depositions, testimony, and other proceedings in the cause concerning or affecting your petitioner, and also for his there appearing and entering special bail in the cause if special bail was originally requisite therein. And your petitioner prays this honorable court to accept said petition and bond and

such surety, and to proceed no further in such suit, or to proceed no further in the case against your petitioner. And your petitioner will ever pray, &c.

H. S. KING.

EVARTS, SOUTHMAYD & CHOATE,
Attorneys for Petitioner.

CITY AND COUNTY OF NEW YORK, *ss:*

Henry Seymour King, being duly sworn, doth depose and say
145 that he is the petitioner named in and who has executed the foregoing petition; that he has read the said petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matter therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

H. S. KING.

Sworn to before me this 17th day of March, 1881.

WILLIAM R. MONTGOMERY,
Notary Public, New York County.

Filed and entered December 13th, 1881. S. B. Rolfe, clerk.

146 CITY AND COUNTY OF NEW YORK, *ss:*

A. W. Evarts, of said city, being duly sworn, doth depose and say that he is one of the attorneys for Henry Seymour King, the petitioner named in and who has executed the annexed petition; that deponent has read said petition and knows the contents thereof; that as deponent is informed and believes, ever since on or about the date of the verification of said petition, the said petitioner has been absent from this country and is now so absent, and continues to be an alien and a subject of the Queen of the United Kingdom of Great Britain and Ireland, and to reside in London, in England.

That the suit in said petition mentioned and described is still pending undetermined in the supreme court of the State of New York; that said suit has never been noticed for trial, and that there has never been any trial or final hearing thereof, nor any term at which the same could be tried.

A. W. EVARTS.

147 Sworn to before me this first day of December, 1881.

WM. R. MONTGOMERY,
Notary Public, New York County.

148 Know all men by these presents that we, Henry Seymour King, as principal, and Alfred A. Marsh and George J. Rice, as sureties, are held and firmly bound unto Franklin C. Cornell, as administrator of the goods, chattels, and credits of Ezra Cornell, deceased, his successors, executors, administrators, and assigns, in the sum of one thousand dollars, lawful money of the United States, to be paid to the said Franklin C. Cornell, as administrator as aforesaid, his successors, executors, administrators, or assigns, for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the seventeenth day of March, one thousand eight hundred and eighty-one.

Whereas the above-named Franklin C. Cornell, as administrator of the goods, chattels, and credits of Ezra Cornell, deceased, has heretofore brought suit of a civil nature in equity in the supreme court of the State of New York, in and for the county of Tompkins, against the said Henry Seymour King, impleaded with the Utica, Ithaca and Elmira Rail-
149 road Company and others, which suit is still pending and undetermined in said court;

And whereas the said Henry Seymour King intends, simultaneously with the filing of this bond, to file his petition in said suit in such State court for the removal of such suit into the circuit court of the United States, to be held in the district where such suit is pending, to wit, the circuit court of the United States for the northern district of New York, in the second circuit, according to the provisions of the acts of Congress in such case made and provided:

Now, therefore, the condition of this obligation is such that if the said petitioner shall enter in the said circuit court of the United States, for said northern district of New York, on the first day of its next session, a copy of the record in such suit, and shall pay all costs that may be awarded by the said circuit court, if said court shall hold that such suit was wrongfully or improperly removed thereto, and shall also there appear
150 and enter special bail in such suit, if special bail was originally requisite therein, then the above obligation shall be void, but shall otherwise remain in full force and virtue.

H. S. KING. [L. S.]
A. A. MARSH. [L. S.]
GEORGE J. RICE. [L. S.]

CITY AND COUNTY OF NEW YORK, *ss:*

On the 17th day of March, eighteen hundred and eighty-one, before me personally appeared Henry Seymour King, Alfred A. Marsh, and George J. Rice, to me known to be the three individuals described in and who executed the foregoing instrument, and severally acknowledged to me that they executed the same.

Witness my hand the day and year last above written.

WILLIAM CAREY SANGER,
Notary Public, Kings County, with cert. in N. Y. Co.

CITY AND COUNTY OF NEW YORK, *ss:*

Alfred A. Marsh, one of the obligors named in the foregoing obligation, being duly sworn, deposes and says that he resides at Long Beach,
151 Queens County, in the State of New York; that he is a householder in said State; that he is worth the sum of two thousand dollars over and above all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

A. A. MARSH.

Sworn to before me this 17th day of March, 1881.

WILLIAM CARY SANGER,
Notary Public, Kings County, with cert. in N. Y. Co.

CITY AND COUNTY OF NEW YORK, *ss:*

George J. Rice, one of the obligors named in the foregoing obligation, being duly sworn, deposes and says that he resides at Horseheads, Chemung County, in the State of New York; that he is a freeholder in the said State; that he is worth the sum of two thousand dollars over and above all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

GEORGE J. RICE.

152 Sworn to before me this 17th day of March, 1881.

WILLIAM CARY SANGER,
Notary Public, Kings County, with cert. in N. Y. Co.

Filed and entered December 13th, 1881. S. B. Rolfe, clerk.

153 Know all men by these presents, that we, Henry Seymour King, as principal, and Alfred A. Marsh and George J. Rice, as sureties, are held and firmly bound unto Franklin C. Cornell, as administrator of the goods, chattels, and credits of Ezra Cornell, deceased, his successors, executors administrators, and assigns, in the sum of one thousand dollars, lawful money of the United States, to be paid to the said Franklin C. Cornell, as administrator as aforesaid, his executors, administrators, or assigns, for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the seventeenth day of March, one thousand eight hundred and eighty-one.

Whereas the above-named Franklin C. Cornell, as administrator of the goods, chattels, and credits of Ezra Cornell, deceased, has heretofore brought a suit in the supreme court of the State of New York in and for the county of Tompkins against the said Henry Seymour King, impleaded with the Utica, Ithaca and Elmira Railroad Company and others, which suit
154 is still pending and undetermined in said court; and

Whereas the said Henry Seymour King intends, simultaneously with the filing of this bond, to file his petition in said suit, in such State court, for the removal of such suit, as against him, into the circuit court of the United States to be held in the district where such suit is pending, to wit, the circuit court of the United States for the northern district of New York, in the second circuit, according to the provisions of the acts of Congress in such case made and provided:

Now, therefore, the condition of this obligation is such that if the said petitioner shall enter in such circuit court, on the first day of its session, copies of all process, pleadings, depositions, testimony, and other proceedings in the cause concerning or affecting the said petitioner, and shall also there appear and enter special bail in the cause, if special bail was originally requisite therein, then the above obligation shall be void, but shall otherwise remain in full force and virtue.

H. S. KING. [L. S.]
155 A. A. MARSH. [L. S.]
GEORGE J. RICE. [L. S.]

CITY AND COUNTY OF NEW YORK, *ss:*

On this 17th day of March, eighteen hundred and eighty-one, before me

personally appeared Henry Seymour King, Alfred A. Marsh, and George J. Rice, to me known to be three individuals described in and who executed the foregoing instrument, and severally acknowledged to me that they executed the same.

Witness my hand the day and year last above written.

WILLIAM CARY SANGER,
Notary Public, Kings County, with cert. in N. Y. Co.

CITY AND COUNTY OF NEW YORK, *ss:*

Alfred A. Marsh, one of the obligors in the foregoing obligation, being duly sworn, deposes and says that he resides at Long Beach, Queens County, in the State of New York; that he is a householder in said State; that he is worth the sum of two thousand dollars over and above
156 all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

A. A. MARSH.

Sworn to before me this 17th day of March, 1881.

WILLIAM CARY SANGER,
Notary Public, Kings County, with cert. in N. Y. Co.

CITY AND COUNTY OF NEW YORK, *ss:*

George J. Rice, one of the above obligors in the foregoing obligation, being duly sworn, deposes and says that he resides at Horseheads, Chemung County, in the State of New York; that he is a freeholder in said State; that he is worth the sum of two thousand dollars over and above all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

GEORGE J. RICE.

Sworn to before me this 17th day of March, 1881.

WILLIAM CAREY SANGER,
Notary Public, Kings County, with cert. in N. Y. Co.

157, 158 Filed and entered December 13th, 1881. S. B. Rolfe, clerk.

159 Supreme court.

Trial desired in Tompkins County.

FRANKLIN C. CORNELL, AS ADMINISTRATOR OF the goods, chattels, and credits of Ezra Cornell, deceased,

against

THE UTICA, ITHACA & ELMIRA RAILROAD Company, The Utica, Ithaca & Elmira Railway Company, Henry V. Poor, Thomas N. Rooper, William L. Burt, John Greenough, Henry W. Poor, Joseph Rodbourn, Henry Samuel King, Henry Seymour King, and Enos Wilder.

To the above-named defendants:

You are hereby summoned to answer the complaint in this action, and

to serve a copy of your answer on the plaintiff's attorney, within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer, judgment will be
160 taken against you by default, for the relief demanded in the complaint.

Dated July 10th, 1878.

F. M. FINCH,
Plaintiff's Attorney.

Office address: 18 North Tioga street, Ithaca, New York.
Post-office address: Ithaca, New York.

161 Supreme court, Tompkins County.

FRANKLIN C. CORNELL, AS ADMINISTRATOR, &c., of Ezra Cornell, deceased,
against
HENRY SEYMOUR KING, IMPLEADED WITH The Utica, Ithaca & Elmira Railroad Company et al.

Henry Seymour King, one of the defendants in the above-entitled action, appearing therein by Evarts, Southmayd, & Choate, his attorneys, demurs to the complaint of the plaintiff in the above-entitled action, upon the following grounds:

First. For that the said complaint does not state facts, sufficient to constitute a cause of action.

Second. For that the said complaint does not state facts sufficient to constitute a cause of action against the said defendant Henry Seymour King.

Third. For that in said complaint alleged causes of action against
162 defendants other than said Henry Seymour King have been improperly united with the alleged cause of action against said defendant Henry Seymour King.

Fourth. For that, in said complaint, an alleged cause of action in respect to an alleged agreement between the plaintiff and the firm of Henry S. King & Co. has been improperly united with an alleged cause of action in respect to an alleged agreement of the plaintiff with parties other than said firm of Henry S. King & Co., as by said complaint appears.

Fifth. For that, in said complaint, an alleged cause of action or alleged causes of action in respect to an alleged agreement or alleged agreements between the plaintiff and persons other than this defendant or the firm of Henry S. King & Co., concerning certain alleged transactions are improperly united with an alleged cause of action against the firm of Henry S. King & Co. concerning certain other alleged transactions, as by said complaint appears.

Sixth. For that the alleged cause of action set forth in folios thirty-
163 two to thirty-eight, inclusive, of said complaint is improperly united with the other alleged cause or causes of action in said complaint set forth.

EVARTS, SOUTHMAYD & CHOATE,
Attorneys for Defendant H. Seymour King.

164 Supreme court.

FRANKLIN C. CORNELL, AS ADMINISTRATOR, &C.,
against
HENRY SEYMOUR KING, IMPLEADED, &C.

The defendant Henry Seymour King, having demurred to the complaint of the plaintiff herein, and the issues of law thereby raised having been tried by the court, and the court's decision thereon having been made, whereby such issues are decided in favor of the plaintiff, overruling such demurrer and directing interlocutory judgment in accordance therewith, and also final judgment for the plaintiff for the relief demanded in the complaint, with leave, however, to the defendant upon the payment of costs to withdraw his demurrer and answer over within twenty days after the service of this interlocutory judgment upon him, thereby to stay the entering of such final judgment aforesaid: Now, upon filing said decis-
165 ions, and on motion of F. M. Finch, attorney for the plaintiff, it is hereby ordered and adjudged that the demurrer of the defendant be and hereby is overruled and held for naught; and it is further adjudged and directed that the defendant Henry Seymour King have leave, upon the payment of costs to the plaintiff, to withdraw his demurrer, and to answer over within twenty days from the date of service of a copy of this judgment upon him, and that in default of such withdrawal upon the conditions aforesaid the plaintiff have final judgment for the relief demanded in the complaint in this action. The costs and disbursements to be paid as aforesaid are taxed at $36.25 in case of said demurrer aforesaid.

October 14, 1879.

O. P. HYDE, *Clerk.*

166 At a special term of the supreme court, held at the court-house in the village of Owego, in and for the county of Tioga, commencing April 29, 1879.

Present, C. E. Martin, justice.

FRANKLIN C. CORNELL, AS ADMINISTRATOR, &C.,
against
HENRY SEYMOUR KING, IMPLEADED, &C.

This action having been brought to trial on an issue of law joined herein by the demurrer of Henry Seymour King, one of the defendants.

After hearing Messrs. Evarts, Southmayd and Choate in support of the said demurrer, and F. M. Finch in opposition, ordered that the said demurrer be overruled, and that the plaintiff have interlocutory judgment thereon against the defendant Henry Seymour King, overruling said demurrer with costs, but with leave to the said defendant on payment of costs to withdraw his demurrer and put in an answer within twenty
167 days after the service of a copy of such interlocutory judgment upon the attorney for said defendant.

If the said defendant shall not withdraw his demurrer, pay the costs, and answer the complaint herein, then the plaintiff shall have final judgment against said defendant for the relief demanded in the complaint.

168 Supreme court, Tompkins County.

FRANKLIN C. CORNELL, AS ADMINISTRATOR, &c.,
against
HENRY SEYMOUR KING, IMPLEADED, &c.

Take notice that the defendant, Henry Seymour King, hereby appeals to the general term of this court from the interlocutory judgment entered in the above entitled action, bearing date October 14, 1879, whereby it is ordered and adjudged that the demurrer of the said defendant herein be, and the same is hereby, overruled and held for naught; and it is further adjudged and directed that the said defendant have leave, upon payment of costs to the plaintiff, to withdraw his demurrer and to answer over within twenty days from the date of service of a copy of the said judgment upon him, and that in default of such withdrawal, upon the conditions aforesaid, the plaintiff have final judgment for the relief de-
169 manded in the complaint in said action. And the said defendant appeals to said general term from each and every part of said judgment.

The said defendant also appeals to said court at general term from the order or decision upon the said demurrer, entered in the office of the clerk of this court on the 14th day of October, 1879, and from each and every part of said order or decision.

New York, October 22d, 1879.

Yours, &c.,

EVARTS, SOUTHMAYD & CHOATE,
Attorneys for Defendant Henry Seymour King.

To F. M. FINCH, Esq.,
Plaintiff's Attorney.
O. P. HYDE, Esq., *Clerk.*

170 Supreme court, Tompkins County.

FRANKLIN C. CORNELL, AS ADMINISTRATOR, &c., of Ezra Cornell, deceased,
against
HENRY SEYMOUR KING, IMPLEADED WITH THE Utica, Ithaca & Elmira Railroad Company et al.

CITY AND COUNTY OF NEW YORK, *ss:*

Charles H. Tweed, being duly sworn, deposes and says that he is one of the attorneys for the defendant, Henry Seymour King, in the above entitled action; that he has caused inquiries to be made whether any opinion was filed by Mr. Justice Martin upon overruling the demurrer of the defendant King, in said action; and that so far as he has been able to learn, and as he verily believes, no opinion was filed by said justice thereon.

And further saith not.

CHARLES H. TWEED.

171 Sworn to before me this 20th day of October, 1879.

WM. CARY SANGER,
Notary Public, King's County, with cert. in N. Y. Co.

172 At a general term of the supreme court held at Albany, on the 5th day of February, 1880.

Present: Hon. Wm. L. Learned, pres. justice.
" " A. Bockes, ass't "
" " D. Boardman, " "

FRANKLIN C. CORNELL, AS ADMINISTRATOR OF the goods, chattels, and credits of Ezra Cornell, deceased,
ag't
HENRY SEYMOUR KING, IMPLEADED, &C.

This action coming on to be heard upon an appeal by the defendant King from the interlocutory judgment therein entered at special term, on the 14th day of October, 1879, overruling the demurrer interposed by the defendant King, and after hearing Joseph H. Choate, esq., for the appellant, and F. M. Finch, esq., for the respondent, it is—

Ordered, that said judgment be affirmed, with costs of the ap-
173 peal, and that defendant King have leave, on payment of the costs of the appeal, and within twenty days after service of copy of the judgment of affirmance, to serve an answer in said action on behalf of said defendant King.

(Copy.)

JOHN LARKIN, *Clerk.*

174 Supreme court.

FRANKLIN C. CORNELL, AS ADMINISTRATOR OF the goods, chattels, and credits of Ezra Cornell, deceased,
against
HENRY S. KING, IMPLEADED, &C.

The defendant Henry S. King having appealed from the judgment rendered in this action at a special term of this court, at a term thereof held at Owego, in and for the county of Tioga, on the 14th day of October, 1879, which judgment overruled the demurrer interposed by the said defendant King to the plaintiff's complaint, with costs and disbursements, to the general term of this court, and the said appeal having been argued by Joseph H. Choate, esq., for the appellant, and F. M. Finch, esq., for the respondent, and the decision of said general term having been duly filed, by which said judgment of the special term is in all things affirmed, it is hereby ordered and adjudged that the said judgment of said special
175 term overruling said demurrer be affirmed, with the costs of this appeal, and that defendant Henry S. King have leave, on payment of the costs of the appeal, and within twenty days after service of copy of the judgment of affirmance, to serve an answer in the said action on behalf of said defendant King.

And it is further adjudged that the plaintiff recover of the defendant Henry S. King the sum of sixty-four and $\frac{80}{100}$ dollars for his costs and disbursements of said appeal, and have judgment therefor.

E. A. MARSH,
Dept. Clerk.

176 Supreme court, Tompkins County.

FRANKLIN C. CORNELL, AS ADMINISTRATOR OF the goods, chattels, and credits of Ezra Cornell, deceased,

against

HENRY SEYMOUR KING, IMPLEADED WITH THE Utica, Ithaca and Elmira Railroad Company and others.

Henry Seymour King, one of the defendants in the above-entitled action, appearing therein by Evarts, Southmayd & Choate, his attorneys, answers the complaint of the plaintiff therein as follows:

First. He admits, upon information and belief, that prior to the twenty-ninth day of October, 1874, a line of railroad was in process of construction from Elmira or Horseheads, in the county of Chemung, to Cortland, in the county of Cortland, and passing through portions of the counties of Tioga and Tompkins, and that from the time of the incorporation
177 of the Utica, Ithaca and Elmira Railroad Company, on or about the twenty-fifth day of October, 1871, until about the month of June, 1876, the defendant William L. Burt was president of and an active manager and agent for and on behalf of the said company, and that subsequent to its incorporation as aforesaid, and prior to the fourth day of February, 1878, the said Utica, Ithaca and Elmira Railroad Company was the company engaged in the construction of the line of railroad above referred to so far as the same was constructed during that period, and that on the twenty-ninth day of October, 1874, said railroad was incomplete and needed and required large sums of money to finish the same.

He admits, upon information and belief, that prior to October, 1874, Ezra Cornell, then of Ithaca, New York, but since deceased, had been engaged as a contractor in the construction of said railroad, and that Joseph Rodbourn had aided and assisted in said construction, and that the said Ezra Cornell and Joseph Rodbourn had expended or advanced considerable sums of money in or about such construction.

178 Second. Except as hereinbefore expressly admitted, he has no knowledge or information sufficient to form a belief of the allegations contained in the first twenty-one folios of the said complaint, or any of them and he therefore controverts the said allegations, and each of them, except that he is informed and believes that some contract was, on or about said twenty-ninth day of October, 1874, made and entered into by and between Ezra Cornell, the plaintiff intestate, and the said William L. Burt and Joseph Rodbourn, and Henry V. Poor, Thomas N. Rooker, John Greenough, and the Utica, Ithaca and Elmira Railroad Company in respect to the sale in England by said Greenough, for the other parties to such contract, of the bonds of the last-named railroad company; that this defendant has no knowledge nor information sufficient to form a belief of the precise terms and conditions of such contract, and for the contents, purport, and effects thereof, prays leave to refer to the original of such contract when the same shall be produced, and denies each and every allegation in the complaint herein contained in respect to the con-
179 tents, purport, and effect of such contract, except so far as upon inspection thereof such allegations may be found to be correct and true.

Third. He admits and avers that there were sent to England in or about the year 1875, for the purpose of being sold and delivered to purchasers there, and that there were there sold by and through John Greenough, in the said complaint mentioned—who, in making such sales of such bonds, was acting for and on behalf of the said Ezra Cornell, the plaintiff's intestate, and the other parties to such contract, large quantities of the first mortgage bonds of the said Utica, Ithaca and Elmira Railroad Company, to the amount, in the aggregate, at their par or face value, of at least one million and fifty thousand dollars, and that such bonds were so sold by and through the said Greenough for sums amounting in the aggregate to at least seven hundred and thirty-five thousand dollars, but, except as aforesaid, he has no knowledge nor information sufficient to form a belief of the allegations contained in folios 22 to 31, inclusive, of said com-
180 plaint, or any of them, and he therefore controverts such allegations and each of them.

Fourth. He admits that at the date of the advertisement of sale under the foreclosure proceedings referred to in the thirty-second folio of said complaint, the firm of Henry S. King & Company, which then consisted of Henry Samuel King and this defendant, both of whom resided in England (and of which firm this defendant is now the survivor, the said Henry Samuel King having died on the seventeenth day of November, 1878), held, partly for their own account as owners, and partly for the account of other persons owning the same, such first mortgage bonds of the Utica, Ithaca and Elmira Railroad Company to the amount in the aggregate of upwards of eight hundred and thirty thousand dollars, and that the same constituted a large part of the bonds of said company which had been sold in England, and that his said firm and the other owners of bonds which were held by his said firm for their account, as hereinbefore stated, constituted a large part of the bondholders interested in the foreclosure
181 of the mortgage securing such first mortgage bonds, and in the results thereof, but he has no knowledge or information sufficient to form a belief that the plaintiff, or said Burt in the complaint mentioned, were actual bondholders at the time, or had any lawful interest in the foreclosure of said mortgage or in the results thereof, and he therefore controverts the allegations on that behalf in said complaint contained, and he expressly avers that said Henry S. King and Company did not hold any such bonds for or on account of either the plaintiff or the said Burt, and that neither said plaintiff or said Burt was in any wise interested beneficially or otherwise in the bonds so held by the firm of Henry S. King & Company as aforesaid, or any of them.

Fifth. He admits that at the sale in the month of April, 1878, under the judgment in the foreclosure proceedings above referred to, the property covered by the mortgage in said judgment mentioned was struck off to Daniel A. Lindley, and Edward H. Goodnow, who, in making such purchase, acted under the instructions of the said firm of Henry S. King & Company, and that a referee's deed of the property so sold at
182 such sale was a few days thereafter duly executed and delivered to said purchaser; and that thereafter such proceedings were had that a new company was formed to own and operate the railroad described in said deed, and that the name and title of said company was The Utica, Ithaca and Elmira Railway Company, and that the same is duly organ-

ized and incorporated, and is named as one of the defendants in the action; but, except as hereinbefore expressly admitted, he denies the allegations contained in the thirty-third, thirty-fourth, thirty-fifth, thirty-sixth, and thirty-seventh folios of said complaint, and each of them, and the allegations contained in the thirty-eighth folio of said complaint, down to and including the words "in place and stead of said old bonds."

Sixth. He admits that if said Henry S. King and Company had made any such agreement or arrangements as is in said complaint alleged, which, however, he denies, they and the said Utica, Ithaca and Elmira Railway Company would be unable to make any delivery of any new bonds thereunder, until the ownership of the old bonds had been settled and
183 until the respective rights of the parties claiming such old bonds (if any rights they had therein) had been fully adjudged and determined, but he avers that the rights of the plaintiff and the said Burt and others in, to, and in respect to such old bonds (if any rights they have therein) have never been in any wise adjudged or determined, nor have the claims to the ownership of such bonds been in any wise settled. He admits that the sale of bonds of said Utica, Ithaca and Elmira Railroad Company in England, except, perhaps, at entirely nominal prices, has utterly ceased and ended, and that no market, except, perhaps, at such entirely nominal prices, remains there for such bonds; and that said John Greenough has ceased all efforts to sell the same, but he has no knowledge nor information sufficient to form a belief as to what rights said Greenough may have, or claim, or pretend to have, in respect to such bonds or the sale thereof under the contract in the thirty-eighth folio of said complaint referred to, or otherwise howsoever.

184 Seventh. He avers that prior to the time of the sale of the mortgaged premises under the foreclosure proceedings hereinbefore referred to, this defendant, on behalf of his said firm of Henry S. King & Company, expressly notified and warned the plaintiff that in case the said Henry S. King & Company should purchase, either directly or indirectly, or should direct the purchase of the said mortgaged premises, or any part thereof, at such sale, any such purchase would be for their own account, and subject to their own directions, and the property purchased would be held and disposed of as they should see fit, without any trust or obligation of any kind in favor of the plaintiff or any other person or party in respect thereto, or in respect to any acts or proceedings of any new company which might be thereafter found to own and operate the same, and that the plaintiff must himself protect at such sale any interest which he had, or claimed to have in, to, or in respect to the mortgaged premises, or any part thereof, and the attorney for the plaintiff in such fore-
185 closure suit expressly offered to the plaintiff herein an adjournment of the sale of said mortgaged premises under the judgment in such foreclosure suit from the time at which such sale had been advertised, if he desired such adjournment in order to enable him to make any further arrangements in respect to the protection of his interests or alleged interests in, to, or in respect to such premises, but the said plaintiff expressly stated that he desired no adjournment of said sale for any such purpose, and thereupon, after the express notification and warning so given by the defendants to the plaintiff, and after the offer of adjournment so made to the plaintiff, and by reason of the acts and proceedings of the said plaint-

iff in respect to such notification and such offer, and his subsequent attendance at and assent to such sale, and the subsequent confirmation thereof by the court, any claims which the plaintiff ever had (if any such there ever were) in respect to such sale or purchase, or in respect of any acts or things to be done by any company which might be thereafter
186 organized to own the property so sold, wholly ceased and determined.

Eighth. He avers that the said plaintiff has not, nor has the said Burt or Rodbourn, ever tendered or offered to pay to said Henry S. King and Company or to this defendant a ratable or any proportion of the expenses of the purchase of the said mortgaged premises or connected therewith, or of the expenses of the organization, equipment, and operation of the said Utica, Ithaca and Elmira Railway Company, which expenses, to the amount of upward of one hundred thousand dollars (including the amount of fifty thousand dollars, which was paid by this defendant said firm through the purchasers at such sale as the purchase price of the mortgaged premises under such foreclosure sale thereof), have been already paid by said Henry S. King and Company, or by this defendant as survivor of said firm, or ever tendered or offered to deliver to said Henry S. King and Company, or to this defendant, any bonds of said Utica, Ithaca and Elmira Railroad Company for exchange for bonds of said Utica,
187 Ithaca and Elmira Railway Company, or for any other purpose whatsoever, and he avers that they had but very few, if any, such bonds which they could have so tendered, even if they had seen fit to tender the same.

Ninth. He denies upon information and belief that there was ever any valid, lawful, or sufficient consideration for any such alleged or pretended agreement or arrangement as is referred to in folios 33 to 38 of said complaint, or that there was ever any such alleged or pretended agreement or arrangement, or any note or memorandum of any such alleged or pretended agreement or arrangement in writing, subscribed by or on behalf of the defendants, said firm of Henry S. King and Company, or this defendant, or any party to be charged therewith, and he averst hat any such alleged or pretended agreement or arrangement would be wholly void under the general rules of law applicable to such cases, and also by reason of the statute of the State of New York commonly called the statute of frauds.
188 Tenth. This defendant, further answering, respectfully submits to the court the question whether the defendant The Utica, Ithaca and Elmira Railway Company has any right under the law of the State of New York to execute or deliver any bonds or other similar obligations for or in respect of any formerly existing bonds or obligations of the Utica, Ithaca, and Elmira Railroad Company, or whether the issue of any such bonds or obligations by the said Utica, Ithaca and Elmira Railway Company would be unauthorized and contrary to law and be invalid.

Eleventh. And the said defendant, further answering the said complaint and by way of counter claim thereto, alleges that the said firm of Henry S. King and Company, consisting of Henry Samuel King, now deceased, and this defendant, heretofore and at divers times between the first day of January, 1875, and the first day of July, 1877, purchased large amounts of the said first-mortgage bonds of the said Utica, Ithaca and Elmira Railroad Company through the said John Greenough, who sold the same to

this defendant said firm, under the provisions of the contract which
189 was made with said Greenough by Ezra Cornell, the plaintiff's intestate, and others on or about the twenty-ninth day of October, 1874, in respect to the sale of such bonds, and which was, as this defendant is informed and believes and charges, the same contract referred to or intended to be referred to in the complaint in this action, that such sales of said bonds to defendant's said firm were made through said Greenough in great part for and on behalf of the said Ezra Cornell, the plaintiff's intestate. That such purchases were made by defendant's said firm to Henry S. King and Company in consequence of and in reliance upon the statements which were made by the said Greenough, acting as such agent for and on behalf of the plaintiff's intestate, as well as of the other parties to said contract, in respect to the situation and condition of the railroad of the said Utica, Ithaca and Elmira Railroad Company, and of the gross earnings and net earnings thereof, and of the amount of the earnings of said railroad as compared with the expenses of the operation of the same; but that such statements made by said Greenough for and on behalf of the plaint-
190 iff's intestate as well as of the other parties to such contract in many most important and material particulars were wholly false and fraudulent and intended to deceive, and did in fact deceive defendant's said firm of Henry S. King and Company, and induce them to purchase such bonds, and by reason of the false and fraudulent misstatements and misrepresentations of the said Greenough, acting as the agent of, and for, and on behalf of the said Ezra Cornell, the plaintiff's intestate, as well as the other parties to such contract, the said firm of Henry S. King and Company purchased first-mortgage bonds of the said Utica, Ithaca and Elmira Railroad Company from the said Ezra Cornell as well as the other parties to the said contract, through the said Greenough, to the amount of about nine hundred thousand dollars and paid therefor about six hundred and thirty thousand dollars, and that by reason of such purchase so induced, defendant's said firm suffered damage to the amount of five hundred thousand dollars, in which amount with interest thereon from the first day
191 July, 1877, said plaintiff's intestate by reason of the premises became and was, and the plaintiff as his administrator now is, justly indebted to this defendant as the survivor of the said firm of Henry S. King and Company.

Wherefore the defendant demands judgment against the plaintiff for the said sum of five hundred thousand dollars, with interest thereon from the first day of July, 1877, besides the costs and disbursements of this action.

EVARTS, SOUTHMAYD & CHOATE,
Att'ys for Def't King.

CONSULATE OF THE UNITED STATES AT , *ss:*

Henry Seymour King, being duly sworn, deposes and says that he is one of the defendants in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true to his own knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes the
192 same to be true, and further saith not.

H. S. KING.

Sworn to before me, at the consulate-general of the United States at Montreal, this 9th day of September, 1880.

[CONSULATE SEAL.]

J. Q. SMITH,
Consul-General of the United States for the British North American Provinces.

193 Supreme court, Tompkins County.

FRANKLIN C. CORNELL, AS ADMINISTRATOR OF the goods, chattels, and credits of Ezra Cornell, deceased,

against

HENRY SEYMOUR KING, IMPLEADED WITH THE Utica, Ithaca & Elmira Railroad Company et al.

The plaintiff, for reply to the counter-claim set forth in the answer of Henry Seymour King, one of the defendants in the above-entitled action, shows to the court that he denies that John Greenough, in the sale of the first-mortgage bonds of the Utica, Ithaca and Elmira Railroad to Henry S. King & Co., as set forth in said counter-claim, acted either in whole or in part as the agent of Ezra Cornell, the pl'ff's intestate, or that said John Greenough was, in whole or in part, in any way or in any manner the agent of said Ezra Cornell in the sale of the bonds of the said
194 Utica, Ithaca and Elmira Railroad.

And for further reply to said counter-claim, set forth in the answer of said defendant Henry Seymour King, this plaintiff denies, upon information and belief, that said John Greenough, in the sale of the bonds of the Utica, Ithaca and Elmira Railroad Company to said Henry S. King & Co., made any false or fraudulent representations in respect to the situation and condition of the railroad of the said Utica, Ithaca and Elmira Railroad Company, and of the gross earnings and net earnings thereof, and of the amount of the earnings of said railroad, as compared with the expenses of the operation of the same, or as to any or either of the foregoing matters as set forth in the counter-claim contained in the answer of said defendant Henry S. King.

And the said plaintiff, for further reply to the said counter-claim set forth in said defendant's answer, denies, upon information and be-
195 lief, that the said Henry S. King & Co. were led to purchase or were induced to purchase or did purchase the said bonds of the Utica, Ithaca and Elmira Railroad Company by reason of any representations made to them by said John Greenough in respect to the railroad of said Utica, Ithaca and Elmira Railroad Company, or relying upon any representations made to them in respect thereto by the said John Greenough.

And the said plaintiff, for further reply to said counter-claim contained in the said answer of the defendant Henry S. King, denies, upon information and belief, that the said Henry S. King and Co. suffered any damages whatsoever by reason of the purchase by them of the first-mortgage bonds of the Utica, Ithaca & Elmira Railroad Company through the said

John Greenough, as set forth in the counter-claim contained in the answer of said defendant Henry S. King.

S. H. WILCOX,
Plaintiff's Attorney, Savings Bank Building, Ithaca, N. Y.

196 STATE OF NEW YORK,
County of Tompkins, ss:

Franklin C. Cornell, the plaintiff in the above-entitled action, being duly sworn, says that the foregoing reply is true to his own knowledge except as to those matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

FRANKLIN C. CORNELL.

Subscribed and sworn to before me this 19th day of November, 1880.

M. VAN CLEEF,
Notary Public.

197 Supreme court.

FRANKLIN C. CORNELL, AS ADMINISTRATOR OF the goods, chattels, and credits of Ezra Cornell, deceased,

ag'st

HENRY SEYMOUR KING, IMPLEADED WITH THE Utica, Ithaca & Elmira Railroad Company and others.

First. The above-named plaintiff, replying to that part of the answer of the defendant Henry Seymour King, impleaded, &c., as aforesaid, in the above-entitled action, which constitutes or tends to constitute a counter-claim in this action, admits that the firm of Henry S. King & Co. down to the 17th day of November, 1878, consisted of Henry Samuel King and the defendant Henry Seymour King, and that on the day last named the said Henry Samuel King died, leaving said Henry Seymour King the sole surviving member of said firm.

198 Further replying, the plaintiff admits the incorporation, on or about the date mentioned in said answer, of the defendant The Utica, Ithaca and Elmira Railroad Company, and that the defendant William L. Burt was the president of said railroad company. That a line of said railroad was in process of construction from Horseheads, in the county of Chemung, to Cortland, in the county of Cortland, and passing through portions of the counties of Tioga and Tompkins. That said railroad company was engaged, through contractors, in the construction of the line of railroad above referred to; that on the said 29th day of October, 1874, said railroad was incomplete.

Further replying, the plaintiff admits that prior to October, 1874, Ezra Cornell, then of Ithaca, N. Y., but since deceased, had been engaged as a contractor in the construction of the said road, and as such contractor had paid out large sums of money and incurred considerable liabilities, and that for a part of such money and such liabilities he had received

199 bonds of said railroad company, secured by a first mortgage upon

its real estate, equipment, and appurtenances, and that on the 29th of October, 1874, said Ezra Cornell was the owner and holder of first-mortgage bonds of said company to quite a large amount, some of which were subject to the rights of pledgees, to whom he had turned them out as collateral security for the payment of loans made to said company.

Further replying, the plaintiff admits that the said Ezra Cornell, in order to carry on the construction of such railroad, had hypothecated the greater part of the bonds of the said company so held by him for large sums of money borrowed from divers banks and bankers thereon by the said Ezra Cornell, for which amounts of money the said Ezra was personally liable; that the defendant Joseph Rodbourn had also to a considerable extent aided and assisted in the construction of said railroad, and that in so doing he had advanced considerable sums of money, which sums were advanced, however, to the said railroad, and not to the
200 said Ezra Cornell as alleged in the said answer.

Further replying, the plaintiff admits that on or about the 29th day of October, 1874, a contract was made and entered into by and between the said Ezra Cornell, William L. Burt, Joseph Rodbourn, Henry V. Poor, Thomas N. Rooker, and the Utica, Ithaca and Elmira Railroad Company, as set forth in the complaint in this action, to the original of which he hereby refers, but a large amount of said bonds were sent to England for the purpose of being sold, and that said John Greenough began the work of selling the same; but the plaintiff alleges that several months before said bonds were sent to England, and before said Greenough began the work of selling the same, and before any part of said contract was executed, the said Ezra Cornell died.

Further replying, the plaintiff admits that said Ezra Cornell died intestate about the 9th of December, 1874, and that this defendant was duly appointed by the surrogate of Tompkins County, who had
201 jurisdiction for that purpose, administrator of the goods, chattels, and credits of the said Ezra Cornell, deceased.

Further replying, the plaintiff admits that the defendant Henry W. Poor was a son of the defendant Henry V. Poor.

Further replying, the plaintiff admits that in the month of October, 1875, the defendant Henry Seymour King was on a visit to America, and was taken over the line of said railroad and saw the same; that some time, but at what particular time the plaintiff is unable to say, a part of the proceeds of the sale of said bonds was appropriated to the payment of interest coupons of such said as bonds had been sold in England; that such bonds have ceased to have any market value.

And further replying to that part of the answer of the said defendant Henry Seymour King in the above-entitled action that constitutes or tends to constitute a counter-claim in this action, the said plaintiff denies each and every allegation therein contained not hereinbefore
202 specifically admitted.

Second. And for a second further and separate reply to the counter-claim purporting to be set forth in the answer of the said defendant Henry Seymour King, the plaintiff alleges, upon information and belief, that at the times mentioned in said answer the said firm of Henry S. King & Co. was engaged in the business of buying and selling bonds and other securities, as brokers, for a commission, in the employment of third parties,

and not as principals or on their own account; that, as such, said firm was employed to sell some of the bonds in question on commission, by parties over whom this plaintiff had no control, and for whose acts he was not responsible; that whatever bonds passed into the possession of said Henry S. King & Co. were received by them as brokers, to sell upon commission and not otherwise; that said firm well knew, both from actual inspection and from accurate information, the exact condition of said
203 railroad and of said railroad company, its extent, financial status, business, income, property, prospects, and the like. That, being thus fully informed, and having such knowledge, they received and sold on commission the bonds in question to parties residing in England. That none of said bonds were sold until after the death of the said Ezra Cornell, and none of said bonds were originally purchased by said firm of Henry S. King & Co., but were purchased by third parties through said firm of Henry S. King & Co., and that it was not until years after the first sale of said bonds in England that said firm of Henry S. King & Co. became the owners of any of said bonds, and that such of said bonds as said firm of Henry S. King and Co. ever in fact owned were purchased by them of parties residing in England, to whom they had originally sold them, or their assigns. That whatever was done by the said Henry Seymour King or by his said firm in the original sale or disposition of said bonds was done by them as agents or brokers simply, with full
204 knowledge of all the facts relating to said railroad and said railroad company.

That neither said defendant Henry Seymour King nor his said firm ever made any complaint to the plaintiff on account of any alleged fraud or deceit practiced upon them, such as is alleged in said answer, until the latter part of the year 1880, and not until long after the commencement of this action.

And the plaintiff charges the fact to be that the said counter-claim is an afterthought, and was invented and trumped up for the purpose of influencing a settlement of this and other litigations, and not because the said Henry Seymour King believed he had a genuine cause of action against the plaintiff.

Third. For a third further and separate reply to the cause of action or counter-claim purporting to be set forth in the answer, the plaintiff alleges that said purported counter-claim arose in England, in the Kingdom of Great Britain and Ireland, without the State of New York and
205 the United States of America, where the plaintiff and his intestate always resided. That according to the laws of the Kingdom of Great Britain and Ireland, in force for many years last past, and pursuant to the statute of the Parliament of Great Britain passed in the ninth year of the reign of George the Fourth, King of Great Britain and Ireland, chapter 14 and section six thereof, no action lies against a person for making a false representation of the conduct, credit, ability, or dealings of another with intent to procure credit, money, or goods for such person, unless such false representation is in writing, signed by the parties charged; to which statute, for greater certainty, reference is hereby made as a part of this reply.

And the plaintiff will insist upon the trial of this action, that the defendant, Henry Seymour King, ought not to have or maintain said counter-claim, or any part thereof, because no part of the representations alleged

to have been made by the plaintiff, or by his intestate, is in writing, signed by the plaintiff or by his intestates, as required by the said statute.

206 Fourth. And for a fourth further and separate reply to said purported counter-claim, the plaintiff alleges that he brings this action simply as administrator of the goods, chattels, and credits of Ezra Cornell, deceased; that the estate of said Ezra Cornell has been substantially distributed to those entitled thereto by law, and was so distributed before the pleading of said counter-claim in this action, and before the claim of the defendant, Henry Seymour King, as set forth in his said answer, was ever heard of by the plaintiff; and after the publication, in due form, as required by the revised statutes of the State of New York, of a notice calling upon creditors and claimants to exhibit to this plaintiff their complaints and demands against the estate of the said Ezra Cornell, deceased; that such publication of such notice for the time, in the form and in the manner required by the laws of the State of New York, was completed, and said estate distributed prior to the pleading of said counter-claim, and prior to any notice of the claim therein described being

207 given to this plaintiff, and before he had heard of the same; that there are now no assets in the hands of the plaintiff as such administrator, except the cause of action set forth in the complaint, which, owing to the unexpected and unworthy cause of the defendant, Henry Seymour King, is of uncertain value.

And the plaintiff, as such administrator, will insist upon the trial of this action that no judgment should be received against him, as such administrator, for want of assets in his hands to satisfy the same.

Wherefore the plaintiff demands judgment for the relief that in his complaint he has already demanded.

S. H. WILCOX,
Plaintiff's Attorney, Ithaca, N. Y.

208 STATE OF NEW YORK,
County of Tompkins, ss:

Franklin C. Cornell, of the village of Ithaca, county and State aforesaid, being duly sworn, says that he is the plaintiff in the above-entitled action; that the foregoing reply, which he has read, and the contents of which he knows, is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

F. C. CORNELL.

Subscribed and sworn to before me on this 29th day of August, 1881.
[L. S.] P. G. ELLSWORTH,
Notary Public.

209 *Undertaking on appeal from a judgment directing the payment of money.*

Supreme court, Tompkins County.

FRANKLIN C. CORNELL, AS ADMINISTRATOR, &c., of Ezra Cornell, dec'd,
against
HENRY SEYMOUR KING, IMPLEADED, &c.

Whereas, on the 14th day of October, 1879, in the supreme court for

the county of Tompkins, Franklin C. Cornell, as administrator, &c., of Ezra Cornell, deceased, the respondent, recovered an interlocutory judgment against Henry Seymour King, the appellant, overruling the demurrer heretofore interposed by said King, in the above-entitled action, and adjudging that in default of his withdrawal of such demurrer, upon certain conditions, the plaintiff have final judgment for the relief demanded in the complaint in said action.

And the appellant, feeling aggrieved thereby, intends to appeal therefrom, and from the order or decision to the like effect entered on the same day, in said action, to the general term of this court.

210 Now, therefore, we, David S. Greenough, residing at No. 417 East Market street, in the city of Elmira, and Francis G. Hall, residing at No. 325 Lake street, in said city of Elmira, do jointly and severally, pursuant to the statute in such case made and provided, undertake that the appellant will pay all costs and damages which may be awarded against the appellant on said appeal, not exceeding five hundred dollars, and do also undertake that if the judgment so appealed from, or any part thereof, is affirmed, or the appeal is dismissed, the appellant will pay the sum directed to be paid by the judgment, or the part thereof as to which judgment shall be affirmed.

Dated, October 22d, 1879.

D. S. GREENOUGH.
F. G. HALL.

COUNTY OF CHEMUNG, *ss:*

David S. Greenough, one of the sureties to the foregoing undertaking, being sworn, says that he is a resident and freeholder within the State of New York, and is worth twice the sum specified in the above undertaking over all the debts and liabilities which he owes or has incurred,

211 and exclusive of property exempt by law from levy and sale under an execution.

D. S. GREENOUGH.

Sworn to before me this 22d day of October, 1879.

W. S. KERSHUER,
Notary Public.

COUNTY OF CHEMUNG, *ss:*

Francis G. Hall, one of the sureties to the foregoing undertaking, being sworn, says that he is a resident and freeholder within the State of New York, and is worth twice the sum specified in the above undertaking, over all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

F. G. HALL.

Sworn to before me this 23d day of October, 1879.

W. S. KERSHUER,
Notary Public.

CHEMUNG COUNTY, *ss:*

212 I certify that on the 22d day of October, 1879, before me appeared the above-named David S. Greenough, and on the 23d day

of October, 1879, before me appeared the above-named Francis G. Hall, known to me to be the individuals described in and who executed the above undertaking, and severally acknowledged that they executed the same.

W. S. KERSHUER,
Notary Public in and for Chemung Co., N. Y.

213 At a special term of the supreme court, held at the chambers of the Hon. D. Boardman, in Ithaca, on the 8th December, 1880.
Present, Hon. D. Boardman, justice.

Supreme court, Tompkins County.

FRANKLIN C. CORNELL, AS ADMINISTRATOR OF the goods, chattels, and credits of Ezra Cornell, deceased,
against
THE UTICA, ITHACA & ELMIRA RAILROAD COMPANY; The Utica, Ithaca & Elmira Railway Company et al.

On reading and filing the affidavit of Franklin C. Cornell, the copy of the complaint in this action, and the order to show cause, granted by the Hon. Wm. Murray therein, and the proof of service of the same, together with the stipulations of S. H. Wilcox, pl'ff's att'y, and Charles H.
214 Tweed, att'y for the defendant The Utica, Ithaca & Elmira Railway Company,

Ordered, that the hearing on the return of the order to show cause, made by the Hon. Wm. Murray in the above-entitled action on the 27th day of November, 1880, and returnable at the chambers of the Hon. D. Boardman, in Ithaca, this 8th day of December, 1880, at 10 o'clock a. m., be, and the same is, postponed and adjourned until the 15th day of December, 1880, at the same time and place named in said order to show cause. In the mean time the injunction contained in said order to show cause to remain in full force and effect until the hearing, on the return of said order, on the 15th day of December, 1880.

Ithaca, December 8th, 1880.

S. B. ROLFE, *Clerk.*

215 At a special term of the supreme court, held at the chambers of the Hon. D. Boardman, in Ithaca, in and for Tompkins County, on the 20th day of December, 1880.
Present, Hon. D. Boardman, justice.

Supreme court.

FRANKLIN C. CORNELL, AS ADMINISTRATOR, &c., of Ezra Cornell, deceased,
against
THE UTICA, ITHACA AND ELMIRA RAILROAD Company, and The Utica, Ithaca and Elmira Railway Company et al.

On reading and filing the affidavits and orders to show cause in the

above-entitled action, and due proof of the service of the same, and the several stipulations of the attorneys in said action,

216 Ordered, that the hearing on the return of the said orders to show cause, granted in this action on the 27th day of November, 1880, and on the 15th day of December, 1880, be, and the same is hereby, adjourned to the 21st day of January, 1881. The temporary injunctions contained in said orders to show cause to remain in full force and effect in the mean time.

D. BOARDMAN,
Justice of Sup. Court.

OFFICE OF EVARTS, SOUTHMAYD & CHOATE,
No. 52 Wall Street, New York, January 17, 1881.

S. H. WILCOX, Esq., *Ithaca:*

DEAR SIR: Will you kindly consent to an adjournment of your motions in Cornell versus King et al. to the 18th prox'o?

Yours, truly,

EVARTS, SOTHMAYD & CHOATE.

File. D. B.

Filed Jan'y 21st, 1881. S. B. Rolfe, clerk.

217 Supreme court, Tompkins County.

FRANKLIN C. CORNELL, AS ADMINISTRATOR OF the goods, chattels, and credits of Ezra Cornell, deceased,
against
THE UTICA, ITHACA AND ELMIRA RAILROAD Company et al.

It is hereby stipulated that the motions under the orders to show cause, granted herein on the 27th day of November and the 15th day of December, be adjourned to the 21st day of January, 1881, the temporary injunctions contained in such orders to show cause remaining, however, in force in the mean time.

S. H. WILCOX,
Att'y for Pl'ffs.

The above-mentioned motions are hereby further adjourned until the 18th day of February, 1881, the injunctions remaining in force as above.

S. H. WILCOX,
Pl'ff's Attorney.

ITHACA, *January* 20, 1881.

File.

D. B.

Filed January 21st, 1881. S. B. Rolfe, clerk.

218 At a special term of the supreme court, held at the chambers of the Hon. D. Boardman, in Ithaca, Tompkins County, on the 21st day of January, 1881.

Present, Hon. D. Boardman, justice.

Supreme court, Tompkins County.

FRANKLIN C. CORNELL, AS ADMINISTRATOR OF the goods, chattels, & credits of Ezra Cornell, deceased,
against
THE UTICA, ITHACA & ELMIRA RAILROAD Company; The Utica, Ithaca & Elmira Railway Company, et al.

On reading and filing the affidavits, pleadings, and the several orders to show cause granted in the above action, together with the proof of service of the same, and the proceedings in said action with the several stipula-
219 tions of the attorneys for the respective parties thereto,

Ordered, that the hearing on the return of the orders to show cause, made by the Hon. Wm. Murray in the above-entitled action on the 27th day of November, 1880, and the 15th day of December, 1880, be, and the same is hereby, adjourned to the 18th day of February, 1881, at the same time and place named in said orders to show cause. In the mean time the injunctions contained in said orders to show are to remain in full force and effect until the hearing, on the return of said orders to show cause, on the said 18th day of February, 1881, and the decision thereon.

220 Supreme court, Tompkins County.

FRANKLIN C. CORNELL, AS ADMINISTRATOR OF the goods, chattels, and credits which were of Ezra Cornell, deceased,
against
THE UTICA, ITHACA & ELMIRA RAILROAD Company et al.

It is hereby stipulated that the motions under the orders to show cause granted herein on the 27th day of November and the 15th day of December, 1880, be adjourned to the 18th day of March, 1881, the temporary injunctions contained in such orders to show cause remaining however in force in the mean time.

EVARTS, SOUTHMAYED & CHOATE,
Att'ys for Def't King.
CHARLES H. TWEED, *Att'y for R. R. Co.*
S. H. WILCOX, *Att'y for Pl'ff.*

221 At a special term of the supreme court, held at the chambers of the Hon. D. Boardman, in Ithaca, Tompkins County, on the 18th day of February, 1881.

Present, Hon. D. Boardman, justice.

Supreme court, Tompkins County.

FRANKLIN C. CORNELL, AS ADMINISTRATOR OF the goods, chattels, and credits of Ezra Cornell, deceased,

against

THE UTICA, ITHACA & ELMIRA RAILROAD COMpany, The Utica, Ithaca & Elmira Railway Company, Henry Seymour King, et al.

On reading and filing the affidavits, pleadings, and the several orders to show cause, granted in the above action, together with the proofs of the service of the same, and the proceedings in said action, with the
222 several stipulations of the attorneys for the respective parties thereto,

Ordered, that the hearing on the return of the orders to show cause, granted by the Hon. Wm. Murray, in the above action, on the 27th day of November, 1880, and the 15th day of Dec., 1880, be, and the same is hereby, adjourned from this 18th day of February, 1881, to the 18th day of March, 1881, at the same time and place named in said orders to show cause. In the mean time, the injunctions contained in said orders to show cause are to remain in full force and effect until the hearing on the return of said orders to show cause on the 18th day of March, 1881, and the decision thereon.

[L. S.]

223 STATE OF NEW YORK,
Tompkins County Clerk's Office, ss:

I, Squire B. Rolfe, clerk of said county, do certify that I have compared the foregoing with the originals now on file in said office, and do certify that it is a correct transcript therefrom, and of all and of the whole of said originals.

In testimony whereof I have hereunto subscribed my name and affixed the official seal of said county, at Ithaca, this 14th day of January, A. D. 1882.

[L. S.] S. B. ROLFE, *Clerk.*

224 (Indorsed:) No. 3632. Supreme court, Tompkins County. Franklin C. Cornell, as adm., &c., vs. The Utica, Ithaca and Elmira R. R. Co. et al. Cert. co. record. Evarts, Southmayd & Choate, att'ys for def't King, and the railway company. Filed Jan'y 17, 1882.

225 United States circuit court, northern district of New York.

FRANKLIN C. CORNELL, AS ADMINISTRATOR OF the goods, chattels, and credits of Ezra Cornell, deceased,

against

HENRY SEYMOUR KING, IMPLEADED WITH The Utica, Ithaca and Elmira Railroad Company, The Utica, Ithaca and Elmira Railway Company, Henry V. Poor, Thomas N. Rooker, William L. Burt, John Greenough, Henry W. Poor, Joseph Rodbourn, Henry Samuel King, and Enos Wilder.

To W. H. Bright, esq're, clerk of the U. S. circuit court of the northern district of New York:

SIR: Please take notice that we are retained by the defendant Henry Seymour King in the above-entitled suit, and enter our appearance as his solicitors therein.

New York, January 17th, 1882.

Yours, &c.,

EVARTS, SOUTHMAYD & CHOATE,

226 *Sol'rs for Def't Henry Seymour King, 52 Wall st., New York City.*

(Indorsed:) 3632. U. S. circuit court, north. dist. of New York. Franklin C. Cornell, as administrator, &c., vs. Henry Seymour King, impleaded, &c. Notice of appearance. Evarts, Southmayd & Choate, sol'rs for defendant H'y Seymour King, 52 Wall st., New York. Filed Jan'y 17, 1882.

227 United States circuit court, northern district of New York.

FRANKLIN C. CORNELL, AS ADMINISTRATOR OF the goods, chattels, and credits of Ezra Cornell, deceased,

against

HENRY SEYMOUR KING, THE UTICA, ITHACA and Elmira Railroad Company, The Utica, Ithaca and Elmira Railway Company, Henry V. Poor, Thomas N. Rooker, William L. Burt, John Greenough, Henry W. Poor, Joseph Rodbourn, Henry Samuel King, and Enos Wilder.

To W. H. Bright, esq., clerk of the U. S. circuit court of the northern district of New York:

SIR: Please take notice that we are retained by the defendants John Greenough, Henry V. Poor, and Henry W. Poor in the above-entitled suit, and enter our appearance as their solicitors therein.

Dated New York, March 20th, 1882.

Yours, &c.,

WETMORE & JENNER,

228 *Sol'rs for Def't Greenough, Henry V. Poor, and Henry W. Poor, 206 Broadway, New York City.*

(Indorsed:) 3632. U. S. circuit court, north. dist. of N. Y. Franklin C. Cornell, as administrator, &c., ag'st Henry Seymour King et al. Notice of retainer and appearance. Wetmore & Jenner, sol'rs for def'ts H. V. Poor, H. W. Poor, & J. Greenough, 206 Broadway, New York City. Filed Mar. 27th, 1882.

229, 230 Circuit court of the United States for the northern district of New York.

FRANKLIN C. CORNELL, AS ADMINISTRATOR OF the goods, chattels, and credits of Ezra Cornell, deceased,

against

HENRY SEYMOUR KING, IMPLEADED WITH THE Utica, Ithaca & Elmira Railroad Company, The Utica, Ithaca and Elmira Railway Company, Henry V. Poor, Thomas N. Rooker, William L. Burt, John Greenough, Henry W. Poor, Joseph Rodburn, Henry Samuel King, and Enos Wilder.

Please to take notice that on the annexed affidavits of Samuel H. Wilcox and Squire B. Rolfe, the summons and complaint in the above-entitled action, the answer of the said defendant Henry Seymour King, the reply thereto, the amended answer of said King, and the amended reply thereto; also, upon the answers of the defendants Thomas N. Rooker, Henry V. Poor, William L. Burt, and the amended answer of John Greenough, copies of which are herewith served, upon the orders to show cause, and the injunction orders therein contained, granted by the Hon. William Murray, on the 27th day of November, 1880, and the 15th day of December, 1880, respectively; upon the order to show cause and the injunction order therein contained, granted by the Hon. Douglass Boardman on the 17th day of February, 1881, and the injunction order granted by the Hon. Douglass Boardman at special term on the 25th day of April, 1881, all of which form part of the record removed into this court, together with the papers on the appeal from said order, and on the judgment roll filed in Tompkins County clerk's office on the 24th day of May, 1880; on the appeal from the interlocutory judgment overruling the demurrer of the defendant Henry Seymour King, all of which form a part of the record removed into this court, and on the record on the removal of this cause into this court, filed in the office of the clerk of this court on the 17th day of January, 1882, and on all the papers hitherto served, and on all the proceedings heretofore had in the above-entitled action, and on the petition for the removal of this action from the supreme court of the State of New York, and on all the papers and proceedings herein, we shall move this court, at a term thereof for the purpose of hearing motions, to be held at the court-house in the village of Canandaigua, Ontario County, N. Y., on the 20th day of June, 1882, at the opening of the court on that day, at ten o'clock a. m., or as soon thereafter as counsel can be heard, for an order remanding this action to the said supreme court of the State of New York on the grounds:

First. That the same was improperly removed therefrom in that the

petition for such removal, with the required bonds, were not filed in said supreme court before or at the term at which this cause could have been first tried, and before the trial thereof, as required by section 3 of an act of Congress entitled "An act to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes," approved March 3, 1875.

Second. That the same was improperly removed therefrom, in that the suit herein does not arise under the Constitution or laws of the United States, or treaties made under their authority, or in which the United States is plaintiff or petitioner, or in which there is a controversy between citizens of different States, or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign states, citizens or subjects, nor a controversy which is wholly between citizens of different States; and further, because the petition on the removal of this cause was not made and signed by all the defendants in this action, in accordance with the provisions of section 2 of an act of Congress entitled "An act to determine the jurisdiction of the circuit court of the United States, and to regulate the removal of causes from State courts, and for other purposes," approved March 3d, 1875.

Third. That the same was improperly removed therefrom, because this is not a suit in which there can be a final determination of the controversy therein, so far as it concerns the defendant Henry Seymour King, the sole petitioner for the removal of this action, without the presence of the other defendants as parties in the cause, in accordance with the provisions of subdivision 2, section number 639, chapter 7, of the Revised Statutes of the United States, and for such other or further relief as to the court may seem just.

Ithaca, June 9, 1882.

S. H. WILCOX,
Plaintiff's Attorney.

231 Circuit court of the United States for the northern district of New York.

FRANKLIN C. CORNELL AS ADMINISTRATOR OF the goods, chattels, and credits of Ezra Cornell, deceased,

against

HENRY SEYMOUR KING, IMPLEADED WITH THE Utica, Ithaca & Elmira Railroad Company, The Utica, Ithaca and Elmira Railway Company, Henry V. Poor, Thomas N. Rooker, William L. Burt, John Greenough, Henry W. Poor, Joseph Rodburn, Henry Samuel King, and Enos Wilder.

TOMPKINS COUNTY, *ss:*

Samuel H. Wilcox, of Ithaca, in said county, being duly sworn, says that he is the attorney for the plaintiff in the above-entitled action; that said action was duly commenced in the supreme court of the State of New York by the personal service of the summons and complaint therein on

(Indorsed:) 3632. U. S. circuit court, north. dist. of N. Y. Franklin C. Cornell, as administrator, &c., ag'st Henry Seymour King et al. Notice of retainer and appearance. Wetmore & Jenner, sol'rs for def'ts H. V. Poor, H. W. Poor, & J. Greenough, 206 Broadway, New York City. Filed Mar. 27th, 1882.

229, 230 Circuit court of the United States for the northern district of New York.

FRANKLIN C. CORNELL, AS ADMINISTRATOR OF the goods, chattels, and credits of Ezra Cornell, deceased,

against

HENRY SEYMOUR KING, IMPLEADED WITH THE Utica, Ithaca & Elmira Railroad Company, The Utica, Ithaca and Elmira Railway Company, Henry V. Poor, Thomas N. Rooker, William L. Burt, John Greenough, Henry W. Poor, Joseph Rodburn, Henry Samuel King, and Enos Wilder.

Please to take notice that on the annexed affidavits of Samuel H. Wilcox and Squire B. Rolfe, the summons and complaint in the above-entitled action, the answer of the said defendant Henry Seymour King, the reply thereto, the amended answer of said King, and the amended reply thereto; also, upon the answers of the defendants Thomas N. Rooker, Henry V. Poor, William L. Burt, and the amended answer of John Greenough, copies of which are herewith served, upon the orders to show cause, and the injunction orders therein contained, granted by the Hon. William Murray, on the 27th day of November, 1880, and the 15th day of December, 1880, respectively; upon the order to show cause and the injunction order therein contained, granted by the Hon. Douglass Boardman on the 17th day of February, 1881, and the injunction order granted by the Hon. Douglass Boardman at special term on the 25th day of April, 1881, all of which form part of the record removed into this court, together with the papers on the appeal from said order, and on the judgment roll filed in Tompkins County clerk's office on the 24th day of May, 1880; on the appeal from the interlocutory judgment overruling the demurrer of the defendant Henry Seymour King, all of which form a part of the record removed into this court, and on the record on the removal of this cause into this court, filed in the office of the clerk of this court on the 17th day of January, 1882, and on all the papers hitherto served, and on all the proceedings heretofore had in the above-entitled action, and on the petition for the removal of this action from the supreme court of the State of New York, and on all the papers and proceedings herein, we shall move this court, at a term thereof for the purpose of hearing motions, to be held at the court-house in the village of Canandaigua, Ontario County, N. Y., on the 20th day of June, 1882, at the opening of the court on that day, at ten o'clock a. m., or as soon thereafter as counsel can be heard, for an order remanding this action to the said supreme court of the State of New York on the grounds:

First. That the same was improperly removed therefrom in that the

petition for such removal, with the required bonds, were not filed in said supreme court before or at the term at which this cause could have been first tried, and before the trial thereof, as required by section 3 of an act of Congress entitled "An act to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes," approved March 3, 1875.

Second. That the same was improperly removed therefrom, in that the suit herein does not arise under the Constitution or laws of the United States, or treaties made under their authority, or in which the United States is plaintiff or petitioner, or in which there is a controversy between citizens of different States, or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign states, citizens or subjects, nor a controversy which is wholly between citizens of different States; and further, because the petition on the removal of this cause was not made and signed by all the defendants in this action, in accordance with the provisions of section 2 of an act of Congress entitled "An act to determine the jurisdiction of the circuit court of the United States, and to regulate the removal of causes from State courts, and for other purposes," approved March 3d, 1875.

Third. That the same was improperly removed therefrom, because this is not a suit in which there can be a final determination of the controversy therein, so far as it concerns the defendant Henry Seymour King, the sole petitioner for the removal of this action, without the presence of the other defendants as parties in the cause, in accordance with the provisions of subdivision 2, section number 639, chapter 7, of the Revised Statutes of the United States, and for such other or further relief as to the court may seem just.

Ithaca, June 9, 1882.

S. H. WILCOX,
Plaintiff's Attorney.

231 Circuit court of the United States for the northern district of New York.

FRANKLIN C. CORNELL AS ADMINISTRATOR OF the goods, chattels, and credits of Ezra Cornell, deceased,

against

HENRY SEYMOUR KING, IMPLEADED WITH THE Utica, Ithaca & Elmira Railroad Company, The Utica, Ithaca and Elmira Railway Company, Henry V. Poor, Thomas N. Rooker, William L. Burt, John Greenough, Henry W. Poor, Joseph Rodburn, Henry Samuel King, and Enos Wilder.

TOMPKINS COUNTY, *ss:*

Samuel H. Wilcox, of Ithaca, in said county, being duly sworn, says that he is the attorney for the plaintiff in the above-entitled action; that said action was duly commenced in the supreme court of the State of New York by the personal service of the summons and complaint therein on

the several defendants named therein as follows: On Thomas N. Rooker, Henry W. Poor, and John Greenough July 15, 1878; on the defendant, William L. Burt, July 25, 1878; on the Utica, Ithaca & Elmira Railroad Company, The Utica, Ithaca & Elmira Railway Company, and Joseph Rodburn July 28th, 1878; on Enos Wilder November 12th, 1878; on Henry V. Poor January 10, 1879, and on Henry Seymour King February 12th, 1879. That issue was joined in said action by the service of the answers of the several defendants on plaintiff's attorney as follows: The answers of Thomas N. Rooker, Henry W. Poor, and John Greenough August 22, 1878, and the amended answer of said John Greenough September 12, 1878; the answer of Henry V. Poor January 27, 1879; the answer of William L. Burt March 9, 1879; the answer of the defendants The Utica, Ithaca, & Elmira Railroad Company and The Utica, Ithaca & Elmira Railway Company October 8th, 1879; the answer of Henry Seymour King September 15th, 1880, and the plaintiff's reply to the counterclaim in said defendant's answer was served on the attorneys for Henry Seymour King November 20, 1880; the amended answer of said Henry Seymour King was served March 18, 1881, and the amended reply thereto was served August 30, 1881; that no appearance has been put in by the defendant, Enos Wilder, and no answer or demurrer has been served by him; that the defendant, Joseph Rodburn, has appeared in said action by attorney, but he has put in no demurrer and has served no answer to plaintiff's complaint. That prior to the serving of his answer to plaintiff's complaint, on the 15th day of September, 1880, the said defendant Henry Seymour King, through his attorneys, Messrs. Evarts, Southmayd & Choate, on or about the 24th day of March, 1879, interposed and served on plaintiff's attorney a demurrer to the said plaintiff's complaint. The issue of law upon said demurrer was brought to trial at a special term of the supreme court of the State of New York, held in the village of Owego, Tioga County, on the 29th day of April, 1879, before the Hon. C. E. Martin, a justice of said court, and a judgment therein was rendered in favor of the plaintiff and against the defendant Henry Seymour King, overruling said demurrer, with leave to said defendant, Henry Seymour King, upon payment of costs, to withdraw his demurrer and answer over within twenty days from the date of service of a copy of the said judgment upon him, and that in default of such withdrawal the plaintiff have final judgment for the relief demanded in the complaint in said action, which said judgment was duly docketed in Tompkins County clerk's office October 14, 1879. That subsequent thereto the said defendant Henry Seymour King appealed from said judgment overruling his demurrer to the general term of the supreme court of the State of New York, October 22, 1879; said appeal was brought on for hearing at a general term of said court held in the month of January, 1880, in the city of Albany, and on the 5th day of February, 1880, at said general term, a judgment of affirmance was entered upon said appeal, which judgment was duly entered in Tompkins County clerk's office, May 24th, 1880, and notice thereof duly served on defendant King's attorneys; said judgment giving said defendant King leave, on payment of the costs of the appeal and within twenty days after service of a copy of the judgment of affirmance to serve an answer in said action. And this deponent says that all the proceedings upon such demurrer form a part of the record removed

into this court, and the same are made a part of this affidavit. That said defendant, King, in pursuance of such leave, did, on the 15th day of September, 1880, serve his said answer to said complaint of plaintiff as hereinbefore set forth.

And this deponent further shows that at a special term of the said supreme court held at Ithaca, in and for Tompkins County, Hon. William Murray, a justice of said court presiding, and again at a special term of said supreme court, held at Ithaca aforesaid, on the 15th day of December, 1880, Hon. William Murray presiding, two several orders to show cause, with injunction orders contained therein, were granted by the Hon. William Murray, justice as aforesaid, against the Utica, Ithaca and Elmira Railway Company, one of the defendants in the above entitled action, which said orders to show cause and the injunctions therein contained form a part of the record removed into this court, and are hereby made a part of this affidavit; and this deponent further says, that on or about the 17th day of February, 1881, an order to show cause with an injunction order was granted against the defendant Henry Seymour King, by Hon. Douglass Boardman, a justice of the supreme court of the State of New York; that by consent of the parties thereto these several orders to show cause were brought on for a hearing before the said the Hon. Douglass Boardman, at a special term of the said supreme court held at his cham-
232 bers in Ithaca, on the 18th day of March, 1881; and on the 25th day of April, at a special term of said supreme court, held at his chambers in Ithaca aforesaid, the Hon. Douglass Boardman, as justice aforesaid, made an order enjoining and restraining the Utica, Ithaca & Elmira Railway Company, its agents, officers, and attorneys from issuing or negotiating any bonds of the said Utica, Ithaca and Elmira Railway Company, and from giving any mortgage upon the property, real or personal, or the franchises of the said The Utica, Ithaca and Elmira Railway Company, and from paying or causing or permitting to be paid any part of either the principal or interest of any bonds issued prior thereto, or that might thereafter be issued by or on behalf of said Utica, Ithaca & Elmira Railway Company, and from furnishing and from permitting to be used any of its money, property, or assets for that purpose, and from paying out, using, or in any way disposing of any money or other property or assets already received, or that might thereafter be received, by the Utica, Ithaca & Elmira Railway Company from the sale or negotiation or disposition of any bonds issued prior thereto, or that might be thereafter issued by the Utica, Ithaca & Elmira Railway Company, and from allowing, consenting to, or permitting any disposition whatever of any proceeds or any avails of any bonds of the Utica, Ithaca & Elmira Railway Company issued prior thereto, or that might be thereafter issued; and that until the further order of the court the defendant, Henry Seymour King, both individually and as survivor of the firm of Henry S. King & Co., his attorneys, counsellors, employés, and agents, and especially his agent, George J. Rice, were enjoined and restrained from selling, transferring, or in any way disposing of any bonds or obligations in the form of railroad bonds of the said defendant, The Utica, Ithaca & Elmira Railway Company (which said King either individually or as survivor of Henry S. King & Co. owned or had title to in whole or in part) that might be then in the possession of or under the control of the said defendant King,

either as an individual or as survivor of the firm of Henry S. King & Co., or in the possession of or under the control of any attorney, counsellor, employé, or agent of said Henry Seymour King, as an individual or as such survivor, and from receiving, accepting, or taking into his possession from the said George J. Rice, or from any source whatever, any of the stock of the said defendant, the said The Utica, Ithaca & Elmira Railway Company, and from negotiating, transferring, or in any way disposing of said stock that might then be in the possession or under the control of said Henry Seymour King, individually or as such survivor, or that should at any time thereafter come into the possession or under the control of the said Henry Seymour King, either individually or as such survivor. That on or about the 25th day of April, 1881, the said defendant, The Utica, Ithaca & Elmira Railway Company, and the defendant, Henry Seymour King, appealed from said order for an injunction of the Hon. Douglass Boardman to the general term of the supreme court. Said appeal was brought on for argument at a general term of said supreme court held at Saratoga in and for the third department of said court on the 23d day of September, 1881, and at a general term of said court held at the city of Albany on the 23d day of November, 1881, the appeal from said order was dismissed, and the order of the special term made by the Hon Douglass Boardman, as aforesaid, was affirmed with costs to the plaintiff therein, and the order dismissing said appeal was duly entered in Tompkins County clerk's office December 5th, 1881. And this deponent further says that said order to show cause with the injunction contained therein, granted as aforesaid by the Hon. Douglass Boardman on the 17th day of February, 1881, together with the injunction order granted by him on the 25th day of April, 1881, as above set forth, together with all the proceedings on the appeal therefrom, form part of the record removed into this court, and the same are hereby made a part of this affidavit.

And this deponent further says that the petition for the removal of the above entitled cause from the supreme court of the State of New York to the circuit court of the United States for the northern district of New York was not presented to or filed in the said supreme court until the 13th day of December, 1881; that the record herein was filed in this court on the 17th day of January, 1882.

This deponent further says that a regular special term of the supreme court for the trial of equity causes was held at Ithaca, in and for Tompkins County, commencing on the 14th day of December, 1880, and terminating on the 20th day of December, 1880, for which the above action could have been noticed and at which the same could have been tried.

And deponent further says that the plaintiff is a resident and a citizen of the State of New York, where said action is brought; that the defendants, The Utica, Ithaca & Elmira Railroad Company, The Utica, Ithaca & Elmira Railway Company are corporations organized under the laws of the State of New York, and citizens of said State, and having their principal offices in Elmira, in said State; that the defendants, Thomas N. Rooker, John Greenough, Henry V. Poor and Joseph Rodburn were at the time of the commencement of said action citizens and residents of the State of New York, and each and every one of said defendants are necessary and indispensable parties to this action, and the same cannot be

fully determined and settled without their appearance in the same; that the said defendant, Henry Seymour King, was at the time of the commencement of this action and is now an alien and a citizen of England, residing at London.

And this deponent further states that this is not a suit in which there can be a final determination of the controversy, so far as concerns the defendant, Henry Seymour King, without the presence of the other defendants as parties in the cause; but states that there can be no final determition of the controversy between the plaintiff herein and said Henry Seymour King without the presence of the other defendants as parties to said action, as more fully appears from the pleadings in this action which have been served therein.

And this deponent further says that this is not a suit of a civil nature at law or in equity, arising under the Constitution or laws of the United States, or treaties made under their authority, or in which the 233, 234 United States is plaintiff or petitioner, or in which there is controversy between citizens of different States or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign States, citizens or subjects, nor a controversy which is wholly between citizens of different States.

And this deponent further states that the reason why he has not moved at an earlier term of this court to remand this suit to the supreme court of the State of New York is, that he had an understanding with the attorneys of the defendant Henry Seymour King, that the said suit should remain in statue quo until the return of Charles H. Tweed, esq., one of the defendant King's attorneys, from Europe, he being absent in Europe at the time the petition for removal was filed and the return made to this court, and that this term is the first term of this court at which he could move to remand the cause to the supreme court of the State of New York since said Tweed's return to this country.

S. H. WILCOX.

Subscribed and sworn to before me this 9th day of June, 1882.

M. VAN CLEEF,
United States Circuit Court Commissioner.

Circuit court of the United States for the northern district of New York.

FRANKLIN C. CORNELL, AS ADMINISTRATOR OF the goods, chattels, and credits of Ezra Cornell, deceased,

against

HENRY SEYMOUR KING, IMPLEADED WITH THE Utica, Ithaca & Elmira Railroad Company, The Utica, Ithaca and Elmira Railway Company, Henry V. Poor, Thomas N. Rooker, William L. Burt, John Greenough, Henry W. Poor, Joseph Rodburn, Henry Samuel King, and Enos Wilder.

TOMPKINS COUNTY, *ss:*

Squire B. Rolfe, of Ithaca, in said county, being duly sworn, says that

he is now and has been since January 1st, 1880, the county clerk of Tompkins County; that a regular special term of the supreme court of the State of New York for the trial of equity causes was held at the court-house, in Ithaca, in and for said county of Tompkins, commencing on the 14th day of December, 1880, and terminating on the 20th day of said December, 1880.

S. B. ROLFE.

Sworn to before me this 9th day of June, 1882.

M. VAN CLEEF,
United States Circuit Court Commissioner.

235 *Supreme court, Tompkins County.*

FRANKLIN CORNELL, AS ADMINISTRATOR, ETC., of Ezra Cornell, deceased,
vs.
THE UTICA, ITHACA AND ELMIRA R. R. COMPANY, Thomas N. Rooker, et al.

Thomas N. Rooker, one of the defendants herein, separately answering the complaint of the plaintiff, admits the allegations contained in the 2d and 3d folios thereof, and further admits that on or about the 29th day of October, 1874, a certain contract was made and entered into by and between the Utica, Ithaca and Elmira Railroad Company and others in the words and figures set forth in Schedule A, annexed to and forming part of this answer, and not otherwise.

And said defendant denies the allegations contained in the 18th and 19th and 20th folios of said complaint, and said defendant denies that Ezra Cornell or said plaintiff performed or kept the terms or conditions of said contract. And said defendant has no knowledge or information sufficient to form a belief concerning the alleged appointment of the plaintiff as administrator; and he therefore denies the same.

And said defendant admits that after the execution of said contract, the parties thereto entered upon the performance thereof, and that certain bonds were sent to England, and that John Greenough sold certain thereof.

And said defendant admits that said Henry W. Poor is a son of Henry V. Poor, and was at one time the agent of said trustees.

And defendant alleges that under the terms of said contract there was paid by said trustees in accordance with the same the sums set forth in Schedule B hereto annexed and forming part of this answer, and said payments were approved by said plaintiff.

And said defendant further avers that on or about the 8th day of December, 1876, a just, true, and full accounting was had between this defendant, the said plaintiff and the defendants, Henry V. Poor and Henry W. Poor, and said plaintiff then fully released and discharged this defendant of and from all liability or charge by reason of or growing out of any and all of his acts done in the premises.

And said defendant further avers that he has no knowledge or information sufficient to form a belief as to the allegations contained in folios 31 to 38, inclusive; and he therefore denies the same.

And said defendant denies each and every other allegation in said complaint contained.

And defendant further alleges that he has duly kept and performed all the terms and conditions of said contract on his part to be kept and performed.

Wherefor' this defendant demands judgment that said complaint be dismissed with costs.

ISAAC V. FRENCH,
Att'y for Def't Thomas N. Rooker,
47 William Street, New York.

CITY AND COUNTY OF NEW YORK, *ss:*

Thomas N. Rooker being duly sworn, saith that he is the defendant named in the foregoing answer, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

THOMAS N. ROOKER.

Sworn to before me this 21st day of August, 1878.

CHARLES TAPPAN,
Notary Public, Kings Co., N. Y.

236 CONTRACT.—SCHEDULE A.

It is agreed by and between the Utica, Ithaca and Elmira Railroad Company, Ezra Cornell, Joseph Rodbourn, and William L. Burt, severally, each with the other, as follows, on this 29th day of October, A. D. 1874:

First. The Utica, Ithaca and Elmira Railroad Company agree to assume and pay all the expenses of construction of said road, and all expenditures made, of every kind and nature, to the present time, and to release and discharge Ezra Cornell and all parties from all liability on account of the construction contracts or expenditure thereunder.

Second. Ezra Cornell agrees to convey to said company all the property, rolling stock, tools, equipments, including the excavator, timbers, ties, rails, spikes, bolts, and material of all kinds contracted for or purchased for the construction of said railroad, including all rights of way owned or purchased for the same by him, and furthermore agrees to pay all outstanding bills for construction and materials at Mottville, including the two drafts for the work at Mottville, and all outstanding notes given by him on account of construction or material for said road, including balance of note of O. B. Curran, of about $2,500, at First National Bank, endorsed by said Cornell; and said Cornell further agrees to pay all bills and claims for labor and construction account now due and unpaid between Horseheads and Candor to the amount of $15,000, of which $2,500 is to be furnished in cash upon the execution of this contract, and the balance, $12,500, as soon thereafter as may be required—all said $15,000 to be paid out for such bills and construction account, through O. B. Curran, treasurer, according to a schedule and statement hereto annexed marked A. All other outstanding bills or claims between Horseheads and Candor, to be assumed and paid by Joseph Rodbourn, he to be repaid for the same as hereinafter provided.

The said Cornell further agrees to transfer to H. V. Poor and Thomas N. Rooker, as trustees, all the shares of the capital stock of the Utica,

Ithaca and Elmira Railroad Company that were issued to him under the contract for the construction of said road, being five thousand and forty shares (5,040), absolutely, but to be held and used by them for the purpose hereinafter stated.

The said Cornell further agrees to furnish the rights of way, without expense to the company, through his own lands; also through the University lands, and through the lands of Mrs. Cornell, or others of the family owning the same, from a point near and above Dwyer's Mill, and also from the curve at the rock-cut below Mrs. Benchley's, for curve tracks in both directions southerly to the old Murdock lines; also from near and below Dwyer's Mill through the woods on and down the north bank of Cascadilla Creek, substantially as last surveyed, to lands of Howard C. Williams, for the purpose of constructing a road down the hill into Ithaca, as the same may be located by said railroad company.

Third. Joseph Rodbourn agrees, upon the payment by Ezra Cornell of the outstanding indebtedness due on construction account between Horseheads and Candor to the amount of $15,000, as above set forth, by placing in the hands of O. B. Curran, treasurer, $2,500 in cash, and providing for the remainder as it is from time to time required, to release and discharge said Ezra Cornell, and all parties, from any and all claims and liabilities to him growing out of the construction of said road, or furnishing materials therefor, and all claims of every name and nature.

Said Rodbourn further agrees, upon the execution of this contract, to convey by good and sufficient deeds and conveyances to said railroad company all rights of way, with the road-bed, water-rights, switches, turnouts, depots, buildings, lands, and all rights acquired or provided for by contract or otherwise on said line of railroad as located, occupied, or built, where the same are owned by said Rodbourn, in whole or in part, or contracted for or conveyed to him.

Said Rodbourn further agrees to assume and pay all outstanding indebtedness between Horseheads and Candor over and above $15,000 agreed to be paid by Ezra Cornell, said Rodbourn to be reimbursed for the same by the company as provided herein.

Said Rodbourn further agrees to convey and deliver to said company all timber, ties, material of all kinds furnished, provided, or delivered by him or contracted to be furnished, provided, or delivered by him, to former contractors.

Said Rodbourn further agrees that for all indebtedness above described, and all sums due therefor and thereunder, he will accept and receive the obligation of the company, with the first-mortgage bonds of the company, as security for the payment of said indebtedness; and he agrees to hold and carry said bonds, together with the interest coupons that may become due to him thereon, for the term of three years from the date of this contract, and at any time within three years the company may redeem said bonds by paying the amount due said Rodbourn, and interest thereon.

Fourth. Wm. L. Burt agrees, upon the execution of this contract, to release all parties, including Ezra Cornell, from all claims and indebtedness due him on account of advances for or construction of said road. And further agrees to accept and receive the obligation of the company with the first-mortgage bonds of the company as security for the payment of said indebtedness; and he agrees to hold and carry said bonds,

237 together with the interest coupons that may become due to him thereon, for the term of three years from the date of this contract, and at any time within three years said company may redeem said bonds by paying the amount due said Burt, and interest thereon.

Fifth. The schedule and statement of the items making the $15,000 to be paid by Ezra Cornell is hereunto annexed, marked A.

A schedule and statement of the items and total amount due said Rodbourn from the company under this settlement is hereunto annexed, marked B.

A schedule and statement of the items and total amount due said Burt from the company under this settlement is hereunto annexed, marked C.

Sixth. It is agreed that bonds shall be issued as security to said Rodbourn and said Burt respectively, at the rate of 50 cents on the dollar, as far as they can be issued. The $30,000 bonds, now held by said Burt as security, in the hands of Enos Wilder, to be reckoned as a part of his security.

All coupons on bonds that have been issued, or may be issued, either to Cornell, Rodbourn, or Burt, to be cut off and delivered to the treasurer, to be cancelled up to January 1, 1875; but it is agreed, upon the neglect of the company to pay any interest due on any of the bonds issued by the company other than the above bonds held by Rodbourn and Burt, then the interest on these bonds, and the bonds themselves, shall thereupon become due and payable to said Rodbourn and Burt respectively, to the full face and amount of the bonds held by them, and they may proceed to enforce the same forthwith.

Seventh. The said Cornell, Rodbourn, and Burt agree to advance bonds in proportion to the number held by them respectively, to be sold and disposed of to raise funds to release the bonds now pledged by Mr. Cornell, and to provide $250,000 to complete and construct the road continuously from Horseheads to Cortland, said bonds to be returned to them from bonds issued upon fourteen additional miles of road when completed in the same proportion. Said parties agree that said bonds may be sold up to the amount of one-third of all bonds held by them respectively, but each furnishing the same pro rata, and they agree they may be sold at the rate of not less than 60 cents on the dollar in gold, but one-half of any amount obtained above 60 per cent. shall be accounted for with said 60 per cent.; the other half above 60 per cent. shall be allowed as expenses for negotiating the same. For this purpose Ezra Cornell to be deemed the holder of all the first-mortgage bonds already issued and to be issued for fourteen miles of new road, between Horseheads and Cortland, by the company, except those issued under this contract to said Rodbourn and said Burt, and except $18,000 bonds held by Charles P. Wood, of Auburn, belonging to the company. But the first proceeds from sale of bonds shall be applied to relieve bonds pledged by Ezra Cornell, and pay his obligations secured thereby, and next $250,000 for the construction and completion of the road as above; and until said bonds so pledged are redeemed, and said $250,000 for the road is obtained, the entire proceeds of the sale of said bonds, without any diminution for expenses of sale, shall be so furnished and applied; but after said bonds are redeemed, and said $250,000 for the construction of said road obtained, the parties making the sale of said bonds shall be entitled to receive and retain from the

proceeds of remaining bonds the amounts due them for the sale of said bonds so used. The object of this provision is to secure the use of all funds first obtained by the sale of the first one-third of all the bonds, to save the bonds already pledged, and to provide the $250,000 which it is agreed shall be furnished from these bonds to complete the road from Horseheads to Cortland.

Eighth. The said Ezra Cornell agrees to furnish the second third of all bonds now or hereafter issued, including the bonds on fourteen miles of additional road, if the same shall then be issued, to be sold at 65 cents in gold, one-half above 65 that may be obtained, the other half to be allowed for expenses for selling, and the proceeds of these bonds shall be applied to liquidating said Cornell's obligations, if any remain secured by bonds, and furnishing the $250,000 for completing the road as above.

Said Cornell agrees to furnish the remaining one-third of his bonds to be sold at 70 cents gold, and one-half that may be obtained above that sum, the remaining half to be allowed for expenses of selling the same.

Ninth. It is agreed that all moneys obtained from the sale of all the bonds heretofore issued by this company, except the $18,000 held by C. P. Wood, of Auburn, and from all bonds hereafter to be issued on fourteen miles of additional road, being $885,000 issued previous to 1874, and $200,000 voted to be issued upon ten miles of additional road now constructed, and $280,000 on fourteen miles of additional road when constructed, being $1,365,000, less $18,000, to wit, $1,347,000, shall be applied—

1. To pay the indebtedness of said Cornell, secured by said bonds; 2. To furnish the company the $250,000 to complete the road; 3. To pay the indebtedness due said Rodbourn and said Burt respectively; and 4. Any balance remaining from said proceeds shall be paid over to said Cornell absolutely.

Tenth. The proceeds of said $18,000 of bonds, and the proceeds of any bonds of additional road beyond said fourteen miles, and the proceeds of bonds issued for rolling stock (except those issued in 1872, and now included in the above bonds of Cornell), shall be deemed to be the property of the company, to be accounted for to them.

Eleventh. It is further agreed that the sales of the above bonds, and the control and direction of the above bonds, as they are redeemed, and all the management of the same under this contract, and the bonds themselves, shall be placed under the control and in the hands of H. V. Poor and Thomas N. Rooker, as trustees, and they, upon obtaining
238 from said bonds and the sales thereof, the sum of $500,000 to redeem the bonds pledged by Mr. Cornell, and of which $250,000 shall be delivered to the company to complete the construction of said railroad, said trustees are authorized to deliver absolutely to the parties furnishing said money, as part payment for their services and expenses, all the shares of stock (5,040) placed in their hands in trust under this contract.

Twelfth. And it is further agreed that all the indebtedness of the company to Ezra Cornell, for the construction of the road and for all material furnished for the same, and all obligation incurred and advances made for the company, and for the proceeds of the bonds used under this contract, are by this settlement fixed and determined to be $250,000, which the

company agree to pay in five years from this date, with interest; but no interest shall become due and payable until the maturity of the principal sum, and then shall be paid with it.

Thirteenth. It is further agreed that said Cornell shall deliver to the company, as a part of this settlement, and without further compensation, all the rails purchased of the Rome Rolling Mills for the road (1,400 tons), together with all the spikes, nuts, bolts, and fish-plates purchased for the same, free from all charge and expense, both that delivered at Weedsport and Ithaca; but the company shall pay the freight from those points; and said Cornell shall make good to the company any of said rail, fish-plates, spikes, and bolts that have been delivered to other parties. And it is further agreed that whereas there are various unpaid bills due from the company to third parties, to wit, Lyons and Donnelly, attorney's bill; J. W. Dailey, attorney at Horseheads; to the Nashua Iron Company, for steel locomotive-tire; to H. P. Goodrich, for service and bills paid by him; also for the crossing-frogs at Horseheads; also to Payne & Son's Iron Foundry at Corning, to Cayuta Wheel Works, to Portland Locomotive Works, to John Southard, for right of way and other claims; and whereas the company propose to construct a depot near the new bridge on the University grounds, and as the $18,000 bonds in the hands of Charles P. Wood, of Auburn, are the only bonds of those now issued retained by the company, and said bonds are not now available, it is agreed by all parties that the said H. V. Poor and T. N. Rooker, as trustees under this contract, shall deliver to the treasurer of this company $18,000 of bonds, from the first that shall be issued, from which said indebtedness can be met and paid; and said $18,000 of bonds in the hands of Charles P. Wood shall be used to replace and return said bonds.

Fourteenth. It is agreed that John Greenough, esq., shall immediately, upon the execution of this contract, proceed to London to negotiate and sell the bonds of this company, he assuming all the expenses of the transaction; and he shall be authorized to sell the bonds under the terms of this contract, and receive the compensation as therein provided; and the trustees are authorized to allow him the commission provided in this contract for sale of said bonds, at the price therein fixed; and said trustees are further authorized, upon receiving from said Greenough the sum of $500,000, to relieve the bonds of said Cornell, and of which $250,000 shall be for the company, for the completion of their road, to deliver to said Greenough absolutely all the stock (5,040 shares) placed in their hands in trust for this purpose; and it is agreed the said Greenough shall have the exclusive right to sell the bonds, under the terms of this contract, for the period of ninety days from the date of its execution, and thereafter it shall be open to any parties in common with him, unless he shall have then made sale of said bonds to an amount that shall satisfy said trustees that he can carry through the said sale.

Fifteenth. It is further agreed by all the parties hereto that all questions or disputes that may arise as to the rights or liabilities of the parties under this contract shall be referred to the said H. V. Poor and Thomas N. Rooker, as referees, whose decision shall be final; but if they shall not agree, said two referees shall select a third referee to act with them, and the decision of a majority of said referees shall be final and conclusive upon all parties.

And it is further agreed that all of the $250,000 to be obtained under this contract for completing and constructing the road between Horseheads and Cortland shall be expended by this company, but the money obtained shall be in the custody of the trustees until it is expended from time to time on said work.

THE UTICA, ITHACA & ELMIRA R. R. CO.,
Witness: H. P. GOODRICH. By O. B. CURRAN, *Treasurer.*
Witness: A. B. CORNELL. EZRA CORNELL.
Witness: H. P. GOODRICH. JOSEPH RODBOURN.
Witness: H. P. GOODRICH. WILLIAM L. BURT.

The undersigned, H. V. Poor and Thomas N. Rooker, agree to accept the trusts under the terms of this contract, and agree to execute the same.

HENRY V. POOR.
THOMAS N. ROOKER.

Witness to Henry V. Poor: HENRY W. POOR.
Witness to Rooker: A. B. CORNELL.

I, O. B. Curran, agree to accept the trusts under this contract and execute the same.

O. B. CURRAN.

I, John Greenough, agree to forthwith undertake the negotiation of the within bonds on the terms and conditions herein provided.

J. GREENOUGH.

SCHEDULE A.

$15,000.

(This schedule has a large number of items, the total amounting to a few dollars less than $15,000, and is attached to the original written contract.)

239, 240 SCHEDULE B.

The schedule of my accounts, as made out by N. O. Nightingale, and now in your (Ezra Cornell's) hands, is to be annexed to the contract, deducting from it the fifteen thousand dollars that appear on the schedule of items annexed to the contract.

The total amount due me is the remaining balance, with ten miles of ties for road now on hand, which I have furnished, and which have not yet been used or charged in my account, amounting to ten thousand dollars.

JOSEPH RODBOURN.

At a meeting of the board of directors of the Utica, Ithaca and Elmira Railroad Company, held at Ithaca, November 12, 1874.

* * * * * * *

It was unanimously voted,

"That the amount due Joseph Rodbourn under said contract, according to Schedule B, is $58,000, less $15,000 in Schedule A, and less $5,000

(note held by Reynolds, Bennett & Co.), both to be paid by Ezra Cornell, leaving $38,000; and to this sum $10,000 is to be added for ties for ten miles of road hereafter to be constructed, making that of Schedule B $48,000."

A true copy from the minutes.

(Signed) O. B. CURRAN, *Secretary.*

SCHEDULE C.

The schedule of William L. Burt's account is the statement of account on the files of the company, and as reported by the committee of the board of directors, and voted and fixed by the board, and interest thereon to the date of this contract.

WILLIAM L. BURT.

At a meeting of the board of directors of the Utica, Ithaca and Elmira Railroad Company, held at Ithaca, November 12, 1874.

* * * * * * *

It was unanimously voted,

"That the amount due William L. Burt under said contract, according to Schedule C, is the sum of $77,062.16, and interest from July 1, 1874."

A true copy from the minutes.

(Signed) O. B. CURRAN, *Secretary.*

Explanatory contract.

This agreement, made this twenty-ninth day of October, 1874, witnesseth:

Whereas under the contract this day executed by and between the Utica, Ithaca and Elmira Railroad Company, Ezra Cornell, Joseph Rodbourn, and William L. Burt, it is provided that the proceeds of $1,347,000 bonds, to be sold under the provisions of said contract, are to be applied for certain purposes, and the balance shall be paid over to said Cornell absolutely; it is understood and agreed that, provided said bonds are not sold under the terms of said contract, said Cornell shall himself have the right to take the whole of said bonds on the same terms and conditions; and if any portion of said bonds are sold, and the balance cannot be so sold, said Cornell shall have the right to take such balance of bonds on the same terms and conditions; and any bonds and proceeds of bonds remaining, after satisfying the stipulations and conditions of said contract, shall be delivered to and be the property of said Cornell, absolutely.

And it is further agreed and understood that said company shall forthwith, upon the completion of any number of additional miles of road up to said fourteen miles, as provided in said contract, wherever the same may be built, issue bonds thereon at the rate of $20,000 per mile, as each mile is completed, and deliver the same to said trustees to make up the $1,347,000 bonds provided for in said contract.

And it is further agreed and understood that the obligation of the company to pay said Cornell $250,000, under the terms of said contract, is

distinct from and in addition to his right to the balance of the bonds or proceeds, whatever the same may be, under the contract.

UTICA, ITHACA & ELMIRA R. R. CO.
By O. B. CURRAN, *Treasurer.*
EZRA CORNELL.
JOSEPH RODBOURN.
WILLIAM L. BURT.

Witness:
A. B. CORNELL, to E. C.

The undersigned, H. V. Poor and Thomas N. Rooker, agree to accept the trusts under the terms of this contract and agree to execute the same.

HENRY V. POOR,
THOMAS N. ROOKER.

Witness to H. V. Poor: HENRY W. POOR.
Witness to Thomas N. Rooker: A. B. CORNELL.

I, O. B. Curran, agree to accept the trusts under this contract and execute the same.

O. B. CURRAN.

I, John Greenough, agree to forthwith undertake the negotiation of the within bonds on the terms and conditions herein provided.

J. GREENOUGH.

Witness to J. Greenough: HENRY W. POOR.

241 SCHEDULE B.

DR. *Utica, Ithica & Elmira R. R. bonds, in acc't with Henry W. Poor,* CR.

To amount E. Cornell's acc't	$311,794 38	By proceeds 1,099, U., I. & E. R. R. bonds, per acc't herewith £141,531.3.1, allotted as per contract pro rata, as follows:	
" Wm. L. Burt's acc't	45,176 72		
" Joseph Rodbourn's acc't	39,489 60		
" coupons' interest acc't	58,816 67	For company's 153 bonds	$104,035 06
" rolling stock acc't	58,785 02	" E. Cornell's 946 "	643,249 43
" U., I. & E. Railroad acc't	242,986 74	By balance at debit bro't down	9,764 64
	757,049 13		$757,049 13
To balance at debit acc't U., I. & E. R. R. bonds	$9,764 64		

E. & O. E. New York, November 17th, 1876.

242 (Indorsed:) Supreme court, Tompkins County. Franklin C. Cornell, administrator, &c., vs. The Utica, Ithaca & Elmiria R. R. Co., Thomas N. Rooker, et al. Copy answer of defendant Thomas N. Rooker. Isaac V. French, att'y for def't Rooker, 47 Williams st., N. Y. City. To F. M. Finch, esq., plaintiff's attorney.

243 Supreme court, Tompkins County.

FRANKLIN C. CORNELL, AS ADMINISTRATOR, etc., of Ezra Cornell, deceased,
vs.
THE UTICA, ITHACA AND ELMIRA R. R. COMPANY, John Greenough, and others.

John Greenough, one of the defendants herein, for separate amended answer to the complaint of the plaintiff, avers:

That he has not any knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in fols. 1, 2, 3, and 4, as far as the words "and John Greenough" in folio 4, and in folios 18, 19, 20, 21, and the words "except that 25,000 held and owned by Mrs. Thomas N. Rooker" in folio 24, and in folios 32, 33, 34, 35, 36, 37, and 38, to and including the words "no market remains for them" in folio 38, and he therefore denies them except as hereinafter specifically admitted.

And this defendant alleges that on or about the 29th day of October, 1874, a certain contract was made and entered into by and between the Utica, Ithaca and Elmira Railroad Company, Ezra Cornell, William L. Burt, Joseph Rodbourn, Henry V. Poor, and Thomas N. Rooker, in the words and figures set forth in Schedule A, hereto annexed and forming part of this answer.

And defendant further alleges on information and belief that there were paid by the trustees named in said contract the various amounts specified in Schedule B, hereto annexed and forming part of this answer and for the purposes therein mentioned.

And this defendant admits that he agreed to enter upon the work of selling certain bonds of the Utica and Elmira Railroad Company upon the terms and conditions as set forth substantially in folios 11 and 16 of said complaint, and defendant alleges that he duly kept and performed all the conditions of the contract on his part to be kept and performed.

And defendant alleges that all of said bonds which came into his hands or under his control were sold, and the proceeds thereof duly accounted for, except two hundred and eight of said bonds, which defendant was unable to sell.

That said two hundred and eight bonds were duly tendered to the plaintiff by this defendant, but said plaintiff failed to receive the same, and they were subsequently duly attached while in the hands of the agent of this defendant, in the city of Boston by a writ of attachment issuing out of the superior court of the State of Massachusetts, the same being a court of record, in an action therein pending between William L. Burt, as plaintiff, and Franklin C. Cornell and others, defendants, and said bonds are now in the custody and under the control of said court by virtue of such attachment, and said action is still pending and undetermined.

And deponent admits that Henry W. Poor is a son of Henry V. Poor.

And defendant admits that he has ceased all efforts to sell said bonds.

And the defendant denies each and every other allegation in said complaint contained not hereinbefore specifically admitted.

Wherefore this defendant demands judgment that said complaint be dismissed with costs.

ISAAC V. FRENCH,
Att'y for Def't John Greenough,
47 Williams Street, New York City.

CITY AND COUNTY OF NEW YORK, *ss:*

John Greenough, being duly sworn, saith that he is the defendant named in the foregoing answer, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

JOHN GREENOUGH.

Sworn to before me this 10th day of September, 1878.
EDWARD W. PERRY,
Notary Public, City and County of New York.

244 CONTRACT.—SCHEDULE A.

It is agreed by and between the Utica, Ithaca and Elmira Railroad Company, Ezra Cornell, Joseph Rodbourn, and William L. Burt, severally, each with the other, as follows, on this 29th day of October, A. D. 1874:

First. The Utica, Ithaca and Elmira Railroad Company agree to assume and pay all the expenses of construction of said road, and all expenditures made, of every kind and nature, to the present time, and to release and discharge Ezra Cornell and all parties from all liability on account of the construction contracts or expenditure thereunder.

Second. Ezra Cornell agrees to convey to said company all the property, rolling-stock, tools, equipments, including the excavator, timbers, ties, rails, spikes, bolts, and material of all kinds contracted for or purchased for the construction of said railroad, including all rights of way owned or purchased for the same by him, and furthermore agrees to pay all outstanding bills for construction and materials at Mottville, including the two drafts for the work at Mottville, and all outstanding notes given by him on account of construction or material for said road, including balance of note of O. B. Curran, of about $2,500, at First National Bank, endorsed by said Cornell; and said Cornell further agrees to pay all bills and claims for labor and construction account now due and unpaid between Horseheads and Candor to the amount of $15,000, of which $2,500 is to be furnished in cash upon the execution of this contract, and the balance, $12,500, as soon thereafter as may be required—all said $15,000 to be paid out for such bills and construction account, through O. B. Curran, treasurer, according to a schedule and statement hereto annexed, marked A. All other outstanding bills or claims between Horseheads and Candor, to be assumed and paid by Joseph Rodbourn, he to be repaid for the same as hereinafter provided.

The said Cornell further agrees to transfer to H. V. Poor and Thomas N. Rooker, as trustees, all the shares of the capital stock of the Utica, Ithaca and Elmira Railroad Company that were issued to him under the contract for the construction of said road, being five thousand and forty shares (5,040), absolutely, but to be held and used by them for the purpose hereinafter stated.

The said Cornell further agrees to furnish the rights of way, without expense to the company, through his own lands; also through the University lands, and through the lands of Mrs. Cornell, or others of the family owning the same, from a point near and above Dwyer's Mill, and also from the curve at the rock-cut below Mrs. Benchley's, for curve tracks in both directions southerly to the old Murdock lines; also from near and below Dwyer's Mill through the woods on and down the north bank of Cascadilla Creek, substantially as last surveyed, to lands of Howard C. Williams, for the purpose of constructing a road down the hill into Ithaca, as the same may be located by said railroad company.

Third. Joseph Rodbourn agrees, upon the payment by Ezra Cornell of the outstanding indebtedness due on construction account between Horse-

heads and Candor to the amount of $15,000, as above set forth, by placing in the hands of O. B. Curran, treasurer, $2,500 in cash, and providing for the remainder as it is from time to time required, to release and discharge said Ezra Cornell, and all parties, from any and all claims and liabilities to him growing out of the construction of said road, or furnishing materials therefor, and all claims of every name and nature.

Said Rodbourn further agrees, upon the execution of this contract, to convey by good and sufficient deeds and conveyances to said railroad company all rights of way, with the road-bed, water-rights, switches, turnouts, depots, buildings, lands, and all rights acquired or provided for by contract or otherwise on said line of railroad as located, occupied, or built, where the same are owned by said Radbourn, in whole or in part, or contracted for, or conveyed to him.

Said Rodbourn further agrees to assume and pay all outstanding indebtness between Horseheads and Candor over and above $15,000 agreed to be paid by Ezra Cornell, said Rodbourn to be reimbursed for the same by the company, as provided herein.

Said Rodbourn further agrees to convey and deliver to said company all timber, ties, material of all kinds furnished, provided, or delivered by him, or contracted to be furnished, provided, or delivered by him to former contractors.

Said Rodbourn further agrees that for all indebtedness above described, and all sums due therefor and thereunder, he will accept and receive the obligation of the company, with the first-mortgage bonds of the company, as security for the payment of said indebtedness; and he agrees to hold and carry said bonds, together with the interest coupons that may become due to him thereon, for the term of three years from the date of this contract, and at any time within three years the company may redeem said bonds by paying the amount due said Rodbourn and interest thereon.

Fourth. Wm. L. Burt agrees, upon the execution of this contract, to release all parties, including Ezra Cornell, from all claims and indebtedness due him on account of advances for or construction of said road. And further agree to accept and receive the obligation of the company with the first-mortgage bonds of the company as security for the payment of said indebtedness; and he agrees to hold and carry said bonds, together
245 with the interest coupons that may become due to him thereon for the term of three years from the date of this contract, and at any time within three years said company may redeem said bonds by paying the amount due said Burt, and interest thereon.

Fifth. The schedule and statement of the items making the $15,000 to be paid by Ezra Cornell is hereunto annexed marked A.

A schedule and statement of the items and total amount due said Rodbourn from the company under this settlement is hereunto annexed marked B.

A schedule and statement of the items and total amount due said Burt from the company under this settlement is hereunto annexed marked C.

Sixth. It is agreed that bonds shall be issued as security to said Rodbourn and said Burt respectively, at the rate of 50 cents on the dollar, as far as they can be issued. The $30,000 bonds now held by the said Burt as security, in the hands of Enos Wilder, to be reckoned as a part of his security.

All coupons on bonds that have been issued, or may be issued, eithe
Cornell, Rodbourn, or Burt, to be cut off and delivered to the treasu
to be cancelled up to January 1, 1875; but it is agreed, upon the neg
of the company to pay any interest due on any of the bonds issued by
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the interest on these bonds and the bonds themselves shall thereu
become due and payable to said Rodbourn and Burt respectively, to
full face and amount of the bonds held by them, and they may proc
to enforce the same forthwith.

Seventh. The said Cornell, Rodbourn, and Burt agree to advance bo
in proportion to the number held by them respectively, to be sold and
posed of to raise funds to release the bonds now pledged by Mr. Corn
and to provide $250,000 to complete and construct the road continuou
from Horseheads to Cortland, said bonds to be returned to them fr
bonds issued upon fourteen additional miles of road when completed
the same proportion. Said parties agree that said bonds may be sold
to the amount of one-third of all bonds held by them respectively,
each furnishing the same pro rata, and they agree they may be sold at
rate of not less than 60 cents on the dollar in gold, but one-half of a
amount obtained above 60 per cent. shall be accounted for with said
per cent.; the other half above 60 per cent. shall be allowed as expen
for negotiating the same. For this purpose Ezra Cornell to be deem
the holder of all the first-mortgage bonds already issued and to be issu
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shall be applied to relieve bonds pledged by Ezra Cornell and pay
obligations secured thereby, and next, $250,000 for the construction a
completion of the road as above; and until said bonds so pledged are
deemed and said $250,000 for the road is obtained, the entire proceeds
the sale of said bonds, without any diminution for expenses of sale, sh
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$250,000 for the construction of said road obtained the parties maki
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first obtained by the sale of the first one-third of all the bonds, to sa
the bonds already pledged, and to provide the $250,000 which it is agre
shall be furnished from these bonds to complete the road from Horsehea
to Cortland.

Eighth. The said Ezra Cornell agrees to furnish the second third of a
bonds now or hereafter issued, including the bonds on fourteen miles
additional road, if the same shall then be issued, to be sold at 65 cents
gold, one-half above 65 that may be obtained, the other half to be allow
for expenses for selling, and the proceeds of these bonds shall be appli
to liquidating said Cornell's obligations, if any remain secured by bond
and furnishing the $250,000 for completing the road as above.

Said Cornell agrees to furnish the remaining one-third of his bonds,
be sold at 70 cents gold, and one-half that may be obtained above th
sum, the remaining half to be allowed for expenses of selling the same.

Ninth. It is agreed that all moneys obtained from the sale of all the bonds heretofore issued by this company, except the $18,000 held by C. P. Wood, of Auburn, and from all bonds hereafter to be issued on fourteen miles of additional road, being $885,000 issued previous to 1874, and $200,000 voted to be issued upon ten miles of additional road now constructed, and $280,000 on fourteen miles of additional road when constructed, being $1,365,000, less $18,000, to wit, $1,347,000, shall be applied—

1, to pay the indebtedness of said Cornell secured by said bonds; 2, to furnish the company the $250,000 to complete the road; 3, to pay the indebtedness due said Rodbourn and said Burt respectively; and, 4, any balance remaining from said proceeds shall be paid over to said Cornell absolutely.

Tenth. The proceeds of said $18,000 of bonds and the proceeds of any bonds of additional road beyond said fourteen miles, and the proceeds of bonds issued for rolling stock (except those issued in 1872 and now included in the above bonds of Cornell) shall be deemed to be the property of the company to be accounted for to them.

Eleventh. It is further agreed that the sales of the above bonds and the control and direction of the above bonds as they are redeemed, and all the management of the same under this contract and the bonds themselves shall be placed under the control and in the hands of H. V. Poor
246 and Thomas N. Rooker, as trustees, and they, upon obtaining from said bonds and the sales thereof the sum of $500,000 to redeem the bonds pledged by Mr. Cornell, and of which $250,000 shall be delivered to the company to complete the construction of said railroad, said trustees are authorized to deliver absolutely to the parties furnishing said money, as part payment for their services and expenses, all the shares of stock (5,040) placed in their hands in trust under this contract.

Twelfth. And it is further agreed that all the indebtedness of the company to Ezra Cornell for the construction of the road and for all material furnished for the same, and all obligation incurred and advances made for the company, and for the proceeds of the bonds used under this contract, are by this settlement fixed and determined to be $250,000, which the company agree to pay in five years from this date with interest; but no interest shall become due and payable until the maturity of the principal sum, and then shall be paid with it.

Thirteenth. It is further agreed that said Cornell shall deliver to the company as a part of this settlement, and without further compensation, all the rails purchased of the Rome Rolling Mills for the road (1,400 tons), together with all the spikes, nuts, bolts, and fish-plates purchased for the same, free from all charge and expense, both that delivered at Weedsport and Ithaca; but the company shall pay the freight from those points; and said Cornell shall make good to the company any of said rail, fish-plates, spikes, and bolts that have been delivered to other parties. And it is further agreed that whereas there are various unpaid bills due from the company to third parties, to wit, Lyons and Donnelly, attorney's bill; J. W. Dailey, attorney at Horseheads; to the Nashua Iron Company, for steel locomotive tire; to H. P. Goodrich, for service and bills paid by him, also for the crossing-frogs at Horseheads; also to Payne & Son's Iron Foundry at Corning, to Cayuta Wheel Works, to

Portland Locomotive Works, to John Southard, for right of way and other claims; and whereas the company propose to construct a depot near the new bridge on the University grounds, and as the $18,000 bonds in the hands of Charles P. Wood, of Auburn, are the only bonds of those now issued retained by the company, and said bonds are not now available, it is agreed by all parties that the said H. V. Poor and T. N. Rooker, as trustees under this contract, shall deliver to the treasurer of this company $18,000 of bonds from the first that shall be issued, from which said indebtedness can be met and paid; and said $18,000 of bonds in the hands of Charles P. Wood shall be used to replace and return said bonds.

Fourteenth. It is agreed that John Greenough, esq., shall immediately, upon the execution of this contract, proceed to London to negotiate and sell the bonds of this company, he assuming all the expenses of the transaction; and he shall be authorized to sell the bonds under the terms of this contract and receive the compensation as therein provided; and the trustees are authorized to allow him the commission provided in this contract for sale of said bonds at the price therein fixed; and said trustees are further authorized, upon receiving from said Greenough the sum of $500,000, to relieve the bonds of said Cornell, and of which $250,000 shall be for the company for the completion of their road, to deliver to said Greenough absolutely all the stock (5,040 shares) placed in their hands in trust for this purpose; and it is agreed the said Greenough shall have the exclusive right to sell the bonds under the terms of this contract for the period of ninety days from the date of its execution, and thereafter it shall be open to any parties in common with him, unless he shall have then made sale of said bonds to an amount that shall satisfy said trustees that he can carry through the said sale.

Fifteenth. It is further agreed by all the parties hereto that all questions or disputes that may arise as to the rights or liabilities of the parties under this contract shall be referred to the said H. V. Poor and Thomas N. Rooker, as referees, whose decision shall be final; but if they shall not agree, said two referees shall select a third referee to act with them, and the decision of a majority of said referees shall be final and conclusive upon all parties.

And it is further agreed that all of the $250,000 to be obtained under this contract for completing and constructing the road between Horseheads and Cortland shall be expended by this company; but the money obtained shall be in the custody of the trustees until it is expended from time to time on said work.

THE UTICA, ITHACA & ELMIRA R. R. CO.,
Witness: H. P. GOODRICH. By O. B. CURRAN *Treasurer.*
Witness: A. B. CORNELL. EZRA CORNELL.
Witness: H. P. GOODRICH. JOSEPH RODBOURN.
Witness: H. P. GOODRICH. WILLIAM L. BURT.

The undersigned, H. V. Poor and Thomas N. Rooker, agree to accept the trusts under the terms of this contract, and agree to execute the same.

HENRY V. POOR.
THOMAS N. ROOKER.

Witness to Henry V. Poor: HENRY W. POOR.
Witness to Rooker: A. B. CORNELL.

I, O. B. Curran, agree to accept the trusts under this contract and execute the same.

O. B. CURRAN.

I, John Greenough, agree to forthwith undertake the negotiation of the within bonds on the terms and conditions herein provided.

J. GREENOUGH.

SCHEDULE A.

$15,000.

(This schedule has a large number of items, the total amounting to a few dollars less than $15,000, and is attached to the original written contract.)

247, 248

SCHEDULE B.

The schedule of my accounts, as made out by N. O. Nightingale, and now in your (Ezra Cornell's) hands, is to be annexed to the contract, deducting from it the fifteen thousand dollars that appear on the schedule of items annexed to the contract.

The total amount due me is the remaining balance, with ten miles of ties for road now on hand, which I have furnished, and which have not yet been used or charged in my account, amounting to ten thousand dollars.

JOSEPH RODBOURN.

At a meeting of the board of directors of the Utica, Ithaca and Elmira Railroad Company, held at Ithaca, November 12, 1874,

* * * * * * *

It was unanimously voted:

"That the amount due Joseph Rodbourn under said contract, according to Schedule B, is $58,000, less $15,000, in Schedule A, and less $5,000 (note held by Reynolds, Bennett & Co.), both to be paid by Ezra Cornell, leaving $38,000; and to this sum $10,000 is to be added, for ties for ten miles of road hereafter to be constructed, making that of Schedule B $48,000."

A true copy from the minutes.

(Signed) O. B. CURRAN,
Secretary.

SCHEDULE C.

The schedule of William L. Burt's account is the statement of account on the files of the company, and as reported by the committee of the board of directors, and voted and fixed by the board, and interest thereon to the date of this contract.

WILLIAM L. BURT.

At a meeting of the board of directors of the Utica, Ithaca and Elmira Railroad Company, held at Ithaca, November 12, 1874,

* * * * * * *

It was unanimously voted:

"That the amount due William L. Burt, under said contract, according to Schedule C, is the sum of $77,062.16, and interest from July 1, 1874."

A true copy from the minutes.

(Signed) O. B. CURRAN,
Secretary.

Explanatory contract.

This agreement, made this twenty-ninth day of October, 1874, witnesseth:

Whereas, under the contract this day executed by and between the Utica, Ithaca and Elmira Railroad Company, Ezra Cornell, Joseph Rodbourn, and William L. Burt, it is provided that the proceeds of $1,347,000 bonds, to be sold under the provisions of said contract, are to be applied for certain purposes, and the balance shall be paid over to said Cornell absolutely, it is understood and agreed that, provided said bonds are not sold under the terms of said contract, said Cornell shall himself have the right to take the whole of said bonds on the same terms and conditions; and if any portion of said bonds are sold, and the balance cannot be so sold, said Cornell shall have the right to take such balance of bonds on the same terms and conditions; and any bonds and proceeds of bonds remaining, after satisfying the stipulations and conditions of said contract, shall be delivered to and be the property of said Cornell, absolutely.

And it is further agreed and understood that said company shall forthwith, upon the completion of any number of additional miles of road up to said fourteen miles, as provided in said contract, wherever the same may be built, issue bonds thereon at the rate of $20,000 per mile, as each mile is completed, and deliver the same to said trustees to make up the $1,347,000 bonds provided for in said contract.

And it is further agreed and understood that the obligation of the company to pay said Cornell $250,000, under the terms of said contract, is distinct from and in addition to his right to the balance of the bonds or proceeds, whatever the same may be, under the contract.

UTICA, ITHACA & ELMIRA R. R. Co.,
By O. B. CURRAN, *Treasurer.*
EZRA CORNELL.
JOSEPH RODBURN.
WILLIAM L. BURT.

Witness: A. B. CORNELL, to E. C.

The undersigned, H. V. Poor and Thomas N. Rooker, agree to accept the trusts under the terms of this contract, and agree to execute the same.

HENRY V. POOR.
THOMAS N. ROOKER.

Witness to H. V. Poor: HENRY W. POOR.
Witness to Thomas N. Rooker: A. B. CORNELL.

I, O. B. Curran, agree to accept the trusts under this contract and execute the same.

O. B. CURRAN.

I, John Greenough, agree to forthwith undertake the negotiation of the within bonds on the terms and conditions herein provided.

J. GREENOUGH.

Witness to J. Greenough: HENRY W. POOR.

249 SCHEDULE B.

To amount E. Cornell's acc't	$311,794 38	By proceeds 1,099 U. I. & E. R. R. bonds, per acc' therewith, £141,531. 3. 1, allotted, as per contract pro rata, as follows:	
" Wm. L. Burt's acc't	45,176 72		
" Joseph Rodbourn's acc't	39,489 60		
" coupons' interest acc't	58,816 67	For company's 153 bonds	$104,035 06
" rolling stock acc't	58,785 02	" E. Cornell's 946 "	643,249 43
" U., I. & E. Railroad acc't	242,986 74	By balance at debit bro't down	9,764 64
	757,049 13		$757,049 13
To balance at debit acc't U., I. & E. R. R. bonds	$9,764 64	1877. Aug. 14. By proceeds 95 bonds U., I. & E. R. R. Co., per letters of advice and statements of John Greenough, herewith in sterling £13,222 19.0, in currency	$67,172 58
E. & O. E., New York, November 17th, 1876.		Balance acc't bro't down to debit	1,148 42
1876 Nov. 16. To bal. acc't due as per statement	9,764 64		$68,321 00
1877 Jan. 1. To coupons for Jan., 1877, on 923 bonds of the U., I. & E. R. R. then outstanding	34,779 76		
March 13. To Joseph Rodbourn	1,000 00		
Aug. 14. To payments on acc't U., I. & E. R. R. Co.'s debts to this date	22,776 60		
	$68,321 00		
1877. Aug. 14. To balance acc't due	1,148 42		
E. & O. E., New York, Aug. 14, 1877.			

250 (Indorsed:) Supreme court, Tompkins County. Franklin C. Cornell, administrator, &c., vs. The Utica, Ithaca & Elmira R. R. Co., &c. Copy amended answer of defendant John Greenough, defendant. Isaac V. French, att'y for def't John Greenough.

251 Supreme court, Tompkins County.

FRANKLIN C. CORNELL, AS ADMINISTRATOR OF Ezra Cornell, deceased,
vs.
THE UTICA, ITHACA AND ELMIRA R. R. COMPANY, Henry V. Poor, and others.

Henry V. Poor, one of the defendants herein separately answering the complaint of the plaintiff, admits the allegations contained in the 2nd and 3rd folios thereof, and further admits that on or about the 29th day of October, 1874, a certain contract was made and entered into between the Utica, Ithaca and Elmira Railroad Company and others in the words and figures set forth in the schedule A annexed to and forming part of this answer, and not otherwise.

And said defendant denies the allegations contained in the 18th, 19th, and 20th folios of said complaint, and said defendant denies that Ezra Cornell or said plaintiff performed or kept the terms or conditions of said contract, and said defendant has no knowledge or information sufficient to form a belief concerning the alleged appointment of the plaintiff as administrator, and he therefore denies the same.

And said defendant admits that after the execution of said contract the

parties thereto entered upon the performance thereof, and that certain bonds were sent to England, and that John Greenough sold certain thereof. And said defendant admits that Henry W. Poor is a son of this defendant, and was at one time the agent of said trustees.

And defendant alleges that under the terms of said contract there was paid by said trustees in accordance with the same the sums set forth in schedule B, hereto annexed and forming part of this answer, and said payments were approved by said plaintiff.

And said defendant further avers that on or about the 8th day of December, 1876, a just, true, and full accounting was had between this defendant, the said plaintiff, and the defendants Thomas N. Rooker and Henry W. Poor, and said plaintiff then fully released and discharged this defendant of and from all liability and charge by reason of or growing out of any and all of his acts done in the premises.

And said defendant further avers that he has no knowledge or information sufficient to form a belief as to the allegations contained in folios 31 to 38 inclusive, and he therefore denies the same.

And said defendant denies each and every other allegation in said complaint contained.

And defendant further alleges that he has duly kept and performed all the terms and conditions of said contract on his part to be kept and performed.

Wherefore this defendant demands judgment that said complaint be dismissed with costs.

ISAAC V. FRENCH,
Att'y for Def't Henry V. Poor,
47 Williams street, New York City.

CITY AND COUNTY OF NEW YORK, *ss:*

Henry V. Poor, being duly sworn, saith that he is the defendant named in the foregoing answer, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

HENRY V. POOR.

Sworn to before me this 23rd day of January, 1879.

HENRY STONE,
Notary Public, New York County.

252 CONTRACT.—SCHEDULE A.

It is agreed by and between the Utica, Ithaca and Elmira Railroad Company, Ezra Cornell, Joseph Rodbourn, and William L. Burt, severally, each with the other, as follows, on this 29th day of October, A. D. 1874:

First. The Utica, Ithaca and Elmira Railroad Company agree to assume and pay all the expenses of construction of said road, and all expenditures made, of every kind and nature, to the present time, and to release and discharge Ezra Cornell and all parties from all liability on account of the construction contracts or expenditure thereunder.

Second. Ezra Cornell agrees to convey to said company all the property, rolling-stock, tools, equipments, including the excavator, timbers, ties, rails, spikes, bolts, and material of all kinds contracted for or purchased for the

construction of said railroad, including all rights of way owned or purchased for the same by him, and furthermore agrees to pay all outstanding bills for construction and materials at Mottville, including the two drafts for the work at Mottville, and all outstanding notes given by him on account of construction or material for said road, including balance of note of O. B. Curran, of about $2,500, at First National Bank, endorsed by said Cornell; and said Cornell further agrees to pay all bills and claims for labor and construction account now due and unpaid between Horseheads and Candor to the amount of $15,000, of which $2,500 is to be furnished in cash upon the execution of this contract, and the balance, $12,500, as soon thereafter as may be required—all said $15,000 to be paid out for such bills and construction account, through O. B. Curran, treasurer, according to a schedule and statement hereto annexed, marked A. All other outstanding bills or claims between Horseheads and Candor to be assumed and paid by Joseph Rodbourn, he to be repaid for the same as hereinafter provided.

The said Cornell further agrees to transfer to H. V. Poor and Thomas N. Rooker, as trustees, all the shares of the capital stock of the Utica, Ithaca and Elmira Railroad Company that were issued to him under the contract for the construction of said road, being five thousand and forty shares (5,040), absolutely, but to be held and used by them for the purpose hereinafter stated.

The said Cornell further agrees to furnish the rights of way, without expense to the company, through his own lands; also through the University lands, and through the lands of Mrs. Cornell, or others of the family owning the same, from a point near and above Dwyer's mill, and also from the curve at the rock-cut below Mrs. Benchley's, for curve tracks in both directions southerly to the old Murdock lines; also from near and below Dwyer's mill through the woods on and down the north bank of Cascadilla Creek, substantially as last surveyed, to lands of Howard C. Williams, for the purpose of constructing a road down the hill into Ithaca, as the same may be located by said railroad company.

Third. Joseph Rodbourn agrees, upon the payment by Ezra Cornell of the outstanding indebtedness due on construction account between Horseheads and Candor to the amount of $15,000 as above set forth, by placing in the hands of O. B. Curran, treasurer, $2,500 in cash, and providing for the remainder as it is from time to time required, to release and discharge said Ezra Cornell, and all parties, from any and all claims and liabilities to him growing out of the construction of said road, or furnishing materials therefor, and all claims of every name and nature.

Said Rodbourn further agrees, upon the execution of this contract, to convey by good and sufficient deeds and conveyances to said railroad company all rights of way, with the road-bed, water-rights, switches, turnouts, depots, buildings, lands, and all rights acquired or provided for by contract or otherwise on said line of railroad as located, occupied, or built, where the same are owned by said Radbourn, in whole or in part, or contracted for or conveyed to him.

Said Rodbourn further agrees to assume and pay all outstanding indebtedness between Horseheads and Candor over and above $15,000 agreed to be paid by Ezra Cornell; said Rodbourn to be reimbursed for the same by the company as provided herein.

Said Rodbourn further agrees to convey and deliver to said company all timber, ties, material of all kinds furnished, provided, or delivered by him, or contracted to be furnished, provided, or delivered by him to former contractors.

Said Rodbourn further agrees that for all indebtedness above described, and all sums due therefor and thereunder, he will accept and receive the obligation of the company, with the first mortgage bonds of the company, as security for the payment of said indebtedness; and he agrees to hold and carry said bonds, together with the interest coupons that may become due to him thereon, for the term of three years from the date of this contract, and at any time within three years the company may redeem said bonds by paying the amount due said Rodbourn, and interest thereon.

Fourth. Wm. L. Burt agrees, upon the execution of this contract, to release all parties, including Ezra Cornell, from all claims and indebtedness due him on account of advances for or construction of said road. And further agree to accept and receive the obligation of the company, with the first mortgage bonds of the company as security for the payment of said indebtedness; and he agrees to hold and carry said bonds,
253 together with the interest coupons that may become due to him thereon, for the term of three years from the date of this contract, and at any time within three years said company may redeem said bonds by paying the amount due said Burt, and interest thereon.

Fifth. The schedule and statement of the items making the $15,000 to be paid by Ezra Cornell is hereunto annexed, marked A.

A schedule and statement of the items and total amount due said Rodbourn from the company under this settlement is hereunto annexed, marked B.

A schedule and statement of the items and total amount due said Burt from the company under this settlement is hereunto annexed, marked C.

Sixth. It is agreed that bonds shall be issued as security to said Rodbourn and said Burt respectively, at the rate of 50 cents on the dollar, as far as they can be issued. The $30,000 bonds, now held by said Burt as security, in the hands of Enos Wilder, to be reckoned as a part of his security.

All coupons on bonds that have been issued, or may be issued, either to Cornell, Rodbourn, or Burt to be cut off and delivered to the treasurer to be cancelled up to January 1, 1875; but it is agreed, upon the neglect of the company to pay any interest due on any of the bonds issued by the company, other than the above bonds held by Rodbourn and Burt, then the interest on these bonds, and the bonds themselves, shall thereupon become due and payable to said Rodbourn and Burt respectively, to the full face and amount of the bonds held by them, and they may proceed to enforce the same forthwith.

Seventh. The said Cornell, Rodbourn, and Burt agree to advance bonds, in proportion to the number held by them respectively, to be sold and disposed of to raise funds to release the bonds now pledged by Mr. Cornell, and to provide $250,000 to complete and construct the road continuously from Horseheads to Cortland, said bonds to be returned to them from bonds issued upon fourteen additional miles of road when completed in the same proportion. Said parties agree that said bonds may be sold up to the amount of one-third of all bonds held by them respectively, but each

furnishing the same pro rata; and they agree they may be sold at the rate of not less than 60 cents on the dollar, in gold, but one-half of any amount obtained above 60 per cent. shall be accounted for with said 60 per cent.; the other half above 60 per cent. shall be allowed as expenses for negotiating the same. For this purpose Ezra Cornell to be deemed the holder of all the first mortgage bonds already issued and to be issued for fourteen miles of new road, between Horseheads and Cortland, by the company, except those issued under this contract to said Rodbourn and said Burt, and except $18,000 bonds held by Charles P. Wood, of Auburn, belonging to the company. But the first proceeds from sale of bonds shall be applied to relieve bonds pledged by Ezra Cornell, and pay his obligations secured thereby, and next $250,000 for the construction and completion of the road as above; and until said bonds so pledged are redeemed, and said $250,000 for the road is obtained, the entire proceeds of the sale of said bonds, without any diminution for expenses of sale, shall be so furnished and applied; but after said bonds are redeemed, and said $250,000 for the construction of said road obtained, the parties making the sale of said bonds shall be entitled to receive and retain from the proceeds of remaining bonds the amounts due them for the sale of said bonds so used. The object of this provision is to secure the use of all funds first obtained by the sale of the first one-third of all the bonds, to save the bonds already pledged, and to provide the $250,000 which it is agreed shall be furnished from these bonds to complete the road from Horseheads to Cortland.

Eighth. The said Ezra Cornell agrees to furnish the second third of all bonds now or hereafter issued, including the bonds on fourteen miles of additional road, if the same shall then be issued, to be sold at 65 cents in gold, one-half above 65 that may be obtained, the other half to be allowed for expenses for selling, and the proceeds of these bonds shall be applied to liquidating said Cornell's obligations, if any remain secured by bonds, and furnishing the $250,000 for completing the road as above.

Said Cornell agrees to furnish the remaining one-third of his bonds to be sold at 70 cents gold, and one-half that may be obtained above that sum, the remaining half to be allowed for expenses of selling the same.

Ninth. It is agreed that all moneys obtained from the sale of all the bonds heretofore issued by this company, except the $18,000 held by C. P. Wood, of Auburn, and from all bonds hereafter to be issued on fourteen miles of additional road, being $885,000 issued previous to 1874, and $200,000 voted to be issued upon ten miles of additional road, now constructed, and $280,000 on fourteen miles of additional road when constructed, being $1,365,000, less $18,000, to wit, $1,347,000, shall be applied—

1. To pay the indetedness of said Cornell, secured by said bonds. 2. To furnish the company the $250,000 to complete the road. 3. To pay the indebtedness due said Rodbourn and said Burt respectively; and 4. Any balance remaining from said proceeds shall be paid over to said Cornell absolutely.

Tenth. The proceeds of said $18,000 of bonds, and the proceeds of any bonds of additional road beyond said fourteen miles, and the proceeds of bonds issued for rolling stock (except those issued in 1872, and now included in the above bonds of Cornell), shall be deemed to be the property of the company, to be accounted for to them.

Eleventh. It is further agreed that the sales of the above bonds, and the control and direction of the above bonds, as they are redeemed, and all the management of the same under this contract, and the bonds themselves, shall be placed under the control and in the hands of H. V. Poor and Thomas N. Rooker, as trustees, and they, upon obtaining
254 from said bonds and the sales thereof the sum of $500,000 to redeem the bonds pledged by Mr. Cornell, and of which $250,000 shall be delivered to the company to complete the construction of said railroad, said trustees are authorized to deliver absolutely to the parties furnishing said money, as part payment for their services and expenses, all the shares of stock (5,040) placed in their hands in trust under this contract.

Twelfth. And it is further agreed that all the indebtedness of the company to Ezra Cornell, for the construction of the road and for all material furnished for the same, and all obligation incurred and advances made for the company, and for the proceeds of the bonds used under this contract, are by this settlement fixed and determined to be $250,000, which the company agree to pay in five years from this date with interest; but no interest shall become due and payable until the maturity of the principal sum, and then shall be paid with it.

Thirteenth. It is further agreed that said Cornell shall deliver to the company, as a part of this settlement, and without further compensation, all the rails purchased of the Rome Rolling Mills for the road (1,400 tons), together with all the spikes, nuts, bolts, and fish-plates purchased for the same, free from all charge and expense, both that delivered at Weedsport and Ithaca; but the company shall pay the freight from those points; and said Cornell shall make good to the company any of said rail, fish-plates, spikes, and bolts that have been delivered to other parties. And it is further agreed, that whereas there are various unpaid bills due from the company to third parties, to wit, Lyons and Donnelly, attorney's bill; J. W. Dailey, attorney at Horseheads; to the Nashua Iron Company, for steel locomotive-tire; to H. P. Goodrich, for service and bills paid by him; also for the crossing-frogs at Horseheads; also to Payne & Son's Iron Foundry, at Corning; to Cayuta Wheel Works; to Portland Locomotive Works; to John Southard, for right of way, and other claims; and whereas the company propose to construct a depot near the new bridge, on the University grounds, and as the $18,000 bonds in the hands of Charles P. Wood, of Auburn, are the only bonds of those now issued retained by the company, and said bonds are not now available, it is agreed by all parties that the said H. V. Poor and T. N. Rooker, as trustees under this contract, shall deliver to the treasurer of this company $18,000 of bonds, from the first that shall be issued, from which said indebtedness can be met and paid; and said $18,000 of bonds in the hands of Charles P. Wood shall be used to replace and return said bonds.

Fourteenth. It is agreed that John Greenough, esq., shall immediately, upon the execution of this contract, proceed to London to negotiate and sell the bonds of this company, he assuming all the expenses of the transaction; and he shall be authorized to sell the bonds under the terms of this contract, and receive the compensation as therein provided; and the trustees are authorized to allow him the commission provided in this contract for sale of said bonds, at the price therein fixed; and said trustees

are further authorized, upon receiving from said Greenough the sum of $500,000, to relieve the bonds of said Cornell, and of which $250,000 shall be for the company for the completion of their road, to deliver to said Greenough absolutely all the stock (5,040 shares) placed in their hands in trust for this purpose; and it is agreed that said Greenough shall have the exclusive right to sell the bonds, under the terms of this contract, for the period of ninety days from the date of its execution, and thereafter it shall be open to any parties, in common with him, unless he shall have then made sale of said bonds to an amount that shall satisfy said trustees that he can carry through the said sale.

Fifteenth. It is further agreed by all the parties hereto, that all questions or disputes that may arise as to the rights or liabilities of the parties under this contract shall be referred to the said H. V. Poor and Thomas N. Rooker, as referees, whose decision shall be final; but if they shall not agree, said two referees shall select a third referee to act with them, and the decision of a majority of said referees shall be final and conclusive upon all parties.

And it is further agreed that all of the $250,000 to be obtained under this contract for completing and constructing the road between Horseheads and Cortland shall be expended by this company; but the money obtained shall be in the custody of the trustees until it is expended from time to time on said work.

THE UTICA, ITHACA & ELMIRA R. R. CO.,
Witness: H. P. GOODRICH. By O. B. CURRAN, *Treasurer.*
Witness: A. B. CORNELL. EZRA CORNELL.
Witness: H. P. GOODRICH. JOSEPH RODOBURN.
Witness: H. P. GOODRICH. WILLIAM L. BURT.

The undersigned, H. V. Poor and Thomas N. Rooker, agree to accept the trusts under the terms of this contract, and agree to execute the same.

HENRY V. POOR.
THOMAS N. ROOKER.

Witness to Henry V. Poor: HENRY W. POOR.
Witness to Rooker: A. B. CORNELL.

I, O. B. Curran, agree to accept the trusts under this contract and execute the same.

O. B. CURRAN.

I, John Greenough, agree to forthwith undertake the negotiation of the within bonds, on the terms and conditions herein provided.

J. GREENOUGH.

SCHEDULE A.

$15,000.

(This schedule has a large number of items, the total amounting to a few dollars less than $15,000, and is attached to the original written contract.)

255, 256 SCHEDULE B.

The schedule of my accounts, as made out by N. O. Nightingale, and now in your (Ezra Cornell's) hands, is to be annexed to the contract, deducting from it the fifteen thousand dollars that appear on the schedule of items annexed to the contract.

The total amount due me is the remaining balance, with ten miles of ties for road now on hand, which I have furnished, and which have not yet been used or charged in my account, amounting to ten thousand dollars.

JOSEPH RODBOURN.

At a meeting of the board of directors of the Utica, Ithaca and Elmira Railroad Company, held at Ithaca, November 12, 1874.

* * * * * * *

It was unanimously voted,

"That the amount due Joseph Rodbourn under said contract, according to Schedule B, is $58,000, less $15,000 in Schedule A, and less $5,000 (note held by Reynolds, Bennett & Co.), both to be paid by Ezra Cornell, leaving $38,000; and to this sum $10,000 is to be added, for ties for ten miles of road hereafter to be constructed, making that of Schedule B $48,000."

A true copy from the minutes.

(Signed) O. B. CURRAN, *Secretary.*

SCHEDULE C.

The schedule of William L. Burt's account is the statement of account on the files of the company, and as reported by the committee of the board of directors, and voted and fixed by the board, and interest thereon to the date of this contract.

WILLIAM L. BURT.

At a meeting of the board of directors of the Utica, Ithaca and Elmira Railroad Company, held at Ithaca, November 12, 1874.

* * * * * * *

It was unanimously voted,

"That the amount due William L. Burt, under said contract, according to Schedule C, is the sum of $77,062.16, and interest from July 1, 1874."

A true copy from the minutes.

(Signed) O. B. CURRAN, *Secretary.*

Explanatory contract.

This agreement, made this twenty-ninth day of October, 1874, witnesseth:

Whereas, under the contract this day executed by and between the Utica, Ithaca and Elmira Railroad Company, Ezra Cornell, Joseph Rodbourn, and William L. Burt, it is provided that the proceeds of $1,347,000 bonds, to be sold under the provisions of said contract, are to be applied for certain purposes, and the balance shall be paid over to said Cornell absolutely, it is understood and agreed that, provided said bonds are not sold under the terms of said contract, said Cornell shall himself have

the right to take the whole of said bonds on the same terms and conditions; and if any portion of said bonds are sold, and the balance cannot be so sold, said Cornell shall have the right to take such balance of bonds on the same terms and conditions; and any bonds and proceeds of bonds remaining, after satisfying the stipulations and conditions of said contract, shall be delivered to and be the property of the said Cornell, absolutely.

And it is further agreed and understood that said company shall forthwith, upon the completion of any number of additional miles of road up to said fourteen miles, as provided in said contract, whenever the same may be built, issue bonds thereon at the rate of $20,000 per mile, as each mile is completed, and deliver the same to said trustees to make up the $1,347,000 bonds provided for in said contract.

And it is further agreed and understood that the obligation of the company to pay said Cornell $250,000, under the terms of said contract, is distinct from and in addition to his rights to the balance of the bonds or proceeds, whatever the same may be, under the contract.

UTICA, ITHACA & ELMIRA R. R. CO.,
By O. B. CURRAN, *Treasurer.*
EZRA CORNELL.
JOSEPH RODBOURN.
WILLIAM L. BURT.

Witness: A. B. CORNELL to E. C.

The undersigned, H. V. Poor and Thomas N. Rooker, agree to accept the trusts under the terms of this contract, and agree to execute the same.

HENRY V. POOR.
THOMAS N. ROOKER.

Witness to H. V. Poor: HENRY W. POOR.
Witness to Thomas N. Rooker: A. B. CORNELL.

I, O. B. Curran, agree to accept the trusts under this contract and execute the same.

O. B. CURRAN.

I, John Greenough, agree to forthwith undertake the negotiation of the within bonds on the terms and conditions herein provided.

J. GREENOUGH.

Witness to J. Greenough: HENRY W. POOR.

257 SCHEDULE B.

DR. *Utica, Ithaca & Elmira R. R. bonds, in acc't with Henry W. Poor.* CR.

To amount E. Cornell's acc't	$311,794 38	By proceeds 1,099 U., I. & E. R. R. bonds, per acc't herewith, £141,531. 3. 1, allotted as per contract pro rata, as follows:	
" Wm. L. Burt's acc't	45,176 72		
" Joseph Rodbourn's acc't	39,489 60		
" Coupons interest acc't	58,816 67	For company's 153 bonds	$104,035 06
" Rolling stock acc't	58,785 02	" E. Cornell's 946 "	643,249 43
" U., I. & E. Railroad acc't	242,986 74	By balance at debit bro't down	9,764 64
To balance at debit acc't U., I. & E. R. R. bonds	757,049 13 / $9,764 64		$757,049 13

E. & O. E., New York, November 7th, 1876.

258 (Indorsed:) Supreme court. Franklin C. Cornell, administrator, &c., vs. The Utica, Ithaca & Elmira R. R. Co. et al. Copy answer of defendant Henry V. Poor. Isaac V. French, att'y for def't H. V. Poor, 47 William st., N. Y. City.

259 Supreme court, Tompkins County.

FRANKLIN C. CORNELL, AS ADMINISTRATOR of Ezra Cornell, deceased,
vs.
THE UTICA, ITHACA AND ELMIRA R. R. COMPANY, William L. Burt, and others.

William L. Burt, one of the defendants in the above-entitled action separately and for himself, answers the plaintiff's complaint herein as follows:

First. The said defendant admits all the allegations contained between folios one and seventeen, inclusive, and realleges and asserts that the same are in all respects true, except that he denies that there is anything in the contract referred to which requires or demands that any of the schedules attached thereto should contain the items of account as in folio 8 of said complaint it is alleged.

It is also admitted that Ezra Cornell died December 9th, 1874, leaving no will, and that the plaintiff was duly appointed administrator of his estate, as alleged in folio 21 of said complaint.

The defendant also admits all the allegations contained from folio 22 to and including the word contract in the first line of folio 28 in said complaint, and realleges that the same are in all respects true. And the defendant alleges that the fifteen thousand dollars in bonds now held by this plaintiff belongs to and should be paid to this defendant, on his claims under said contract, or so much thereof as may be necessary. And the defendant further says that the twenty thousand dollars in bonds referred to in folio 28 is a part of the payment of the thirty-nine thousand four hundred and eighty-nine dollars and sixty cents, referred to in folio 28, as paid to said Rodbourn, and said amount was more than his due under the contract.

The said defendant alleges and sets forth the following facts in addition to those admitted above: That the defendants Henry Seymour King, H. W. Poor, H. V. Poor, Thomas N. Rooker, and John Greenough wrongfully and unlawfully, and by collusion and mutual agreement and understanding between themselves, paid, or caused to be paid, upwards of eighty thousand dollars of the proceeds of said bonds to cancel the interest coupons on the outstanding bonds, nearly all of which bonds were at that time owned by Henry S. King & Co.; that the said appropriation and use of the aforesaid sum was without any authority from said contract, against the express wish and protest of this defendant, all of which was well known to each of the aforesaid defendants.

The defendant William L. Burt further alleges that the aforesaid defendants also wrongfully and unlawfully appropriated and used upwards of eighty thousand dollars of the money realized on the sale of said bonds to the payment of debts incurred by said railroad for rolling stock, which payments were without any authority from the said contract, and against express the wish and protest of this defendant, all of which facts are well known to each of the aforesaid defendants.

The defendant, further answering, specifically denies all the allegations of said complaint contained from folio 18 to folio 21, inclusive, except such

allegations as have been heretofore specifically admitted, and on the contrary, this defendant alleges, that the items of his said account were carefully examined by the board of directors of said railroad, were approved after such careful examination, and the amount found due from the said railroad and allowed to this defendant, $77,062.16, with interest from July 1st, 1874, was justly due at that time, and was properly allowed and audited by the said company.

This defendant further denies that he has been paid of the proceeds of said bonds the sum of $45,176.72, or that he has been paid in full, as alleged in folios 28 and 29 of plaintiff's complaint, but, on the contrary, this defendant alleges that there is still due him, in pursuance of said contract, the sum of $68,000, with interest thereon from August 1st, 1878.

And this defendant further alleges that the amount realized by said trustees from said bonds is amply sufficient to pay the defendant in accordance with the terms of said contract, after having paid all other obligations required *ed* by said contract to be paid prior to the payment of this defendant, and that the amount misappropriated and diverted from its lawful purposes by the aforesaid defendants, as stated above, was in itself amply sufficient to pay the whole sum due this defendant William L. Burt under said contract.

This defendant further admits the allegations contained in folios 32, 33, 34, 35, 36, 37, and the last allegation in folio 38, and realleges and reaffirms that the same are in all respects true.

The defendant further alleges that he has duly and fully performed and kept on his part all the terms and conditions of said contract to be by him kept and performed.

This defendant further admits that he entered into a contract with Henry L. King & Co. somewhat similar to the one alleged to exist between the plaintiff and said King & Co., as stated in folio 36 of said complaint, but denies each and every other allegation not hereinbefore specifically admitted or denied. Wherefore this defendant demands judgment against his codefendants Henry Seymour King, Henry Samuel King, Henry W. Poor, Henry V. Poor, Thomas N. Rooker, and John Greenough, the Utica, Ithaca & Elmira Railroad Company, and the Utica, Ithaca & Elmira Railway Company for sixty-eight thousand dollars, and interest from the 1st day of August, 1878.

S. D. HALLIDAY,
Att'y for Def't William L. Burt.

TOMPKINS COUNTY, *ss:*

William L. Burt, being duly sworn, says that he is one of the defendants in the above-entitled action; that he has heard the foregoing answer read, and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated to be alleged on information and belief, and as to those he believes it to be true.

W. L. BURT.

Subscribed and sworn this 9th day of March, 1879.

D. F. VAN VLEET,
Notary Public.

260 (Indorsed:) Supreme court. Franklin C. Cornell, as adminis-

trator, &c., of Ezra Cornell, dec'd, vs. The Utica, Ithaca & Elmira R. R. Co., William L. Burt, and others. Answer of W. L. Burt. S. D. Halliday, att'y for def't W. L. Burt, office and p. o. address 41 E. State st., Ithaca, N. Y. To F. M. Finch, esq.

261 Circuit court of the United States for the northern district of New York.

FRANKLIN C. CORNELL, AS ADMINISTRATOR of the goods, chattels and credits of Ezra Cornell, deceased,

against

HENRY SEYMOUR KING, IMPLEADED WITH THE Utica, Ithaca, & Elmira Railroad Company, The Utica, Ithaca, and Elmira Railway Company, Henry V. Poor, Thomas N. Rooker, William L. Burt, John Greenough, Henry W. Poor, Joseph Rodburn, Henry Samuel King, and Enos Wilder.

And now comes the above-named plaintiff, Franklin C. Cornell, and by his attorney, S. H. Wilcox, respectfully shows to this honorable court—

1st. That this is a suit in equity to compel an accounting between certain of the above-named defendants and the plaintiff herein, growing out of a certain agreement between them set forth in plaintiff's complaint therein, and to compel the specific performance on the part of the defendant Henry Seymour King of a contract alleged in said complaint to have been made by him with the plaintiff in the said suit, the said Franklin C. Cornell.

Second. That the trial on the issue at law arising on the demurrer of the defendant Henry Seymour King to the complaint of the plaintiff herein was had at a special term of the supreme court of the State of New York, held at Owego, in Tioga County, the Hon. C. E. Martin, a justice of said court, presiding, on the 29th day of April, 1879, and a judgment therein was rendered in favor of said plaintiff and against said defendant, overruling said demurrer, which said judgment was duly docketed in Tompkins County clerk's office, October 14th, 1879; that on the 22d day of October, 1879, the said defendant King appealed from said judgment, overruling the demurrer to plaintiff's complaint to the general term of the supreme court; that at a regular term of the said general term, held February 5th, 1880, at the city of Albany, a judgment of affirmance on said appeal was rendered, which said judgment was duly entered in Tompkins County clerk's office, May 24th, 1880.

Third. That the term of the said supreme court at which said cause could have been first tried on the merits on the issues of fact raised by all the pleadings therein was held at Ithaca, in Tompkins County, beginning on the 14th day of December, 1880, and terminating on the 20th day of December, 1880.

Fourth. That the petition and bond for the removal of this action from the supreme court of the State of New York into this court were filed on the 13th day of December, 1881; that said petition was made by and on

behalf of the defendant Henry Seymour King, and was signed by him alone.

Fifth. That this is not a suit in equity arising under the Constitution or laws of the United States, or treaties made under their authority, or in which the United States is plaintiff or petitioner, or in which there is a controversy between citizens of different States, or a controversy between citizens of the same State, claiming lands under grants of different States, or a controversy between citizens of a State and foreign states, citizens or subjects, nor a controversy which is wholly between citizens of different States, and which can be fully determined as between them.

Sixth. That this is not a suit in which there can be a final determination of the controversy therein, so far as it concerns the defendant Henry Seymour King, the sole petitioner for the removal of this action, without the presence of the other defendants as parties in the cause, as set forth in the petition of said Henry Seymour King herein.

Wherefore, upon the notice and affidavits hereto prefixed, and upon the answer of the said defendant Henry Seymour King the reply thereto, the amended answer of said King, and the amended reply thereto; also, upon the answers of the defendants Henry V. Poor, Thomas N. Rooker, John Greenough, and William L. Burt, copies of which are hereto prefixed, and upon the orders to show cause and the injunction orders therein contained granted by the Hon. William Murray, on the 27th day of November, 1880, and on the 15th day of December, 1880, respectively; upon the order to show cause and the injunction order therein contained granted by the Hon. Douglass Boardman, on the 17th day of February, 1881, and the injunction order granted by the Hon. Douglass Boardman at special term on the 25th day of April, 1881, together with the papers on the appeal from said order, all of which form a part of the record removed into this court, and on the judgment roli filed in Tompkins County clerk's office on the 24th day of May, 1880, on the appeal from the interlocutory judgment overruling the demurrer of the defendant Henry Seymour King, all of which form a part of the record removed into this court, and on the record on the removal of this cause into this court filed in the office of the clerk of this court on the 17th day of January, 1882, and on all the papers hitherto served, and all the proceedings heretofore had in the above-entitled action, the plaintiff moves this honorable court for an order remanding this action to the supreme court of the State of New York.

Dated June 9th, 1882.

S. H. WILCOX,
Plaintiff's Attorney.

262 (Indorsed:) No. 3632. U. S. circuit court, northern district of New York. Franklin C. Cornell, as administrator, &c., ag'st Henry Seymour King, impleaded, &c. Notice, motion, affidavits, &c., on motion to remand above cause to the supreme court of the State of New York. S. H. Wilcox, pl'ff's att'y, Ithaca, N. Y. Filed August 21, 1882.

263 United States circuit court, northern district of New York.

FRANKLIN C. CORNELL, AS ADMINISTRATOR OF the goods, chattels, and credits of Ezra Cornell, deceased,

against

HENRY SEYMOUR KING, IMPLEADED WITH THE Utica, Ithaca and Elmira Railroad Company and others.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Charles H. Tweed, being duly sworn, deposes and says that he is one of the solicitors and counsel for the defendant Henry Seymour King in the above-entitled suit.

That the said suit, as will appear from the record therein, is a suit against an alien and citizens of the State wherein it is brought, and is a suit in which there can be a final determination of the controversies so far as concerns the defendant King without the presence of the other defendants as parties in the cause.

That it is a suit of a civil nature in equity in which there is a
264 controversy between citizens of a State and foreign subjects, and that there had been no term of the State court at which the same could have been tried prior to the term at which the petition for the removal thereof was presented and filed, and deponent prays leave to refer to the said petition and the affidavits filed therewith for the facts in connection with such suit and the citizenship and residences of the parties thereto, and the character thereof, and other facts in reference to the removal thereof. That he has read the affidavit of Samuel H. Wilcox in said suit sworn to on the 9th day of June, 1882; that the only judgment entered in the said suit upon the overruling of the demurrer of Henry Seymour King therein was an interlocutory judgment dated October 14, 1879, which expressly reserved the right to the said defendant King to answer the complaint in the said suit upon payment of costs, and that after such interlocutory judgment was entered the time of the said defendant to answer therein was extended by order of the court until ten days after the decision of the general term upon the appeal from
265 such interlocutory judgment, and that the order or judgment of said general term upon such appeal expressly reserved the right of said defendant King to answer said complaint within twenty days from the service of such order or judgment, and that thereafter the time of the said King to answer said complaint was expressly extended by orders of the court and stipulations of the plaintiff until the time of the service on the 24th day of September, 1880, of a copy of the answer of the said defendant then served in said suit; and that prior to the time of such service of said answer there was never an hour when the said King had not the strict and absolute legal right to serve an answer on his behalf to the complaint in said suit before the issues should be made for trial therein; that the reply to such answer was received by the attorneys for said King on the 22d day of November, 1880, having been served by mail by plaintiff's attorney on the 20th day of November, 1880; that thereafter the said defendant King under and by virtue of the provisions of the

266 code of civil procedure of the State of New York had the strict and absolute legal right within forty days after the service of such reply upon the said defendant's attorneys to serve an amended answer on behalf of the said defendant King, and that such time to serve an amended answer on behalf of the said defendant King was extended by successive stipulations of the plaintiff's attorney until the 24th day of February, 1881, and thereafter by orders of the said supreme court until the 18th day of March, 1881, and that such amended answer was actually served on the 17th day of March, 1881; that from the time of the service of such original answer on the 24th day of September, 1880, as aforesaid until the time of such service of such amended answer on the 17th day of March, 1881, there was never an hour when the said defendant King had not a strict and absolute legal right to serve an amended answer as his pleading to the complaint in the said cause before the issues should be ready for trial therein, and that it was only on the 31st day of August, 1881, that said defendant's attorneys received the reply of the plaintiff to
267 such amended answer of the defendants, the service of which reply constituted the joinder of the issues between the parties in the said cause.

And deponent further says that under and by virtue of the code of civil procedure of the State of New York no cause can be brought to trial at any term of the said supreme court until written notice of trial shall have been served by the attorney for one of the parties to said suit upon the attorneys for the other parties thereto, and that no notice of trial of this suit has ever been served by either of the parties to the said suit upon the attorneys for the other parties thereto, and that for want of any such notice of trial there has never been a term of the supreme court at which such suit could be tried.

And deponent further says in reply to so much of the said affidavit of said Wilcox as states that there was an understanding with the attorneys of the defendant Henry Seymour King, that the said suit should remain in statu quo until the return of deponent from Europe, that inas-
268 much as the said affidavit does not state with whom or in what manner any such understanding was had, deponent is unable to make any reply to such allegation, or to procure affidavits in reference thereto, and if such allegation is in any wise material to the motion upon which this affidavit is to be read, deponent prays that the complainant or his solicitor be required to state the facts in respect to such alleged understanding and the person with whom such understanding was had, in order that the solicitors for said defendant may have an opportunity to intelligently answer such allegation.

And deponent denies the allegation in said affidavit of said Wilcox contained, that the various orders to show cause for injunctions were brought on for a hearing before Mr. Justice Boardman by consent of parties, but on the contrary deponent expressly states that the counsel for defendant King expressly objected to arguing the motions under such orders to show cause before Mr. Justice Boardman and requested
269 Judge Boardman to permit them to be heard before Mr. Justice Follett, who was then holding a term of court in Ithaca, but Judge Boardman declined to do so, and, notwithstanding the objections of counsel for defendant King, proceeded to hear such motions, and after argument

thereon granted the injunction dated the 25th day of April, 1881, a copy of which is printed in the record in this suit. And further saith not.

CH. H. TWEED.

Subscribed and sworn to before me this 19th day of June, 1882.

[L. S.] WM. R. MONTGOMERY,
Notary Public, New York County.

270 (Indorsed:) 3632. U. S. circuit court north. dist. of New York. Franklin C. Cornell, as administrator, &c., of Ezra Cornell, deceased, vs. Henry Seymour King, impleaded, &c. Affidavit of Charles H. Tweed. Evarts, Southmayd & Choate, def'ts' sol'rs, 52 Wall st., N. Y. Filed Aug. 15, 1882.

271 Circuit court of the United States for the northern district of New York.

FRANKLIN C. CORNELL, AS ADMINISTRATOR, &C., *vs.* THE UTICA, ITHACA & ELMIRA RAILROAD COMPANY & others.

BLATCHFORD, *J.*:

This suit was not removable under the first clause of section 2 of the act of March 3d, 1875, because all the parties on one side of the controversy were not citizens of different States from those on the other, and also because all the defendants did not petition for the removal.

Nor was the suit removable under the second clause of that section, because there was not in the suit a separate controversy wholly between citizens of different States. To entitle a party to a removal under the second clause there must exist in the suit a separate and distinct cause of action, in respect to which all the necessary parties on one side are citizens
272 of different States from those on the other. (Hyde vs. Ruble, 3 Morrison's Transcripts, 516.) The present case does not fall within that of Barney vs. Latham (103 U. S., 205). The decision of the State court at the special and general terms, that the cause of action is entire, is a decision which it is proper for this court to follow, and it leads to the conclusion that there is but a single controversy in the suit, and that parties to the suit who are citizens of the same State with the plaintiff are necessary parties to the controversy to which the plaintiff and defendant King are parties.

The case of Hyde vs. Ruble (supra) decides that the second clause of section 639 of the Revised Statutes is repealed by the act of March 3d, 1875.

The motion to remand is granted, with costs to be taxed.

S. H. Wilcox for the plaintiff.
J. A. Choate for the defendant King.

273, 274 (Indorsed:) 3632. Circuit court of the United States for the northern district of New York. Franklin C. Cornell, as administrator, &c., vs. The Utica, Ithaca and Elmira Railroad Company & oth's. Decision, July 28th, 1882. Orig. filed July 28, 1882.

275 At a stated term of the circuit court of the United States of America for the northern district of New York, in the second circuit, held at the court-house in Canandaigua, on the 20th day of June, in the year of our Lord one thousand eight hundred and eighty-two.

Present, the honorable Samuel Blatchford, justice.

FRANKLIN C. CORNELL, AS ADMINISTRATOR, &C.,
vs.
THE UTICA, ITHACA & ELMIRA RAILWAY COMPANY, HENRY S. KING, et al.

The plaintiff having moved this court for an order remanding this action to the supreme court of the State of New York, and said motion coming on to be heard on the 20th day of June, 1882, or on reading and filing the notice of motion and the affidavits motion thereto annexed, and on the record filed in this court on the 17th day of January, 1882,
276 and after hearing J. McGuire, esq., for said motion, and Joseph Choate, esq., opposed thereto, and on motion of S. H. Wilcox, attorney for said plaintiff,

Ordered that the motion to remand this action to the supreme court of the State of New York be granted, and said action is hereby remanded to the said supreme court of the State of New York.

And it is further ordered that the defendant Henry Seymour King pay to this plaintiff the costs of this motion to be taxed by the clerk of this court.

SAM'L BLATCHFORD,
Circuit Justice.

(Indorsed:) 3632. U. S. circuit court, n. d. of New York. Cornell, adm., &c., vs. King. Order. Filed Aug. 16, 1882.

277 United States circuit court, northern district of New York.

FRANKLIN C. CORNELL, AS ADMINISTRATOR OF the goods, chattels, and credits of Ezra Cornell, deceased,
against
THE UTICA, ITHACA AND ELMIRA RAILWAY COMPANY, HENRY S. KING, et al.

It is hereby consented that the order made by Mr. Justice Blatchford in the above-entitled suit, bearing date the 20th day of June, 1882, be resettled by inserting therein after the words "17th day of January, 1882," the words, "and upon reading and filing the affidavit of Charles H. Tweed, sworn to on the 19th day of June, 1882," and that an order to that effect be entered ex parte on this stipulation.

Ithaca, August 23d, 1882.

S. H. WILCOX,
Att'y for Plaintiff.

278 (Indorsed:) 3632. U. S. circuit court, n. d. of New York. Franklin C. Cornell, as adm'r., &c., vs. The Utica, Ithaca and Elmira Railway Co. et al. Stipulation. Evarts, Southmayd & Choate, def't's sol'rs, 52 Wall st., N. Y. Filed Aug. 28, 1882.

279 At a stated term of the circuit court *court* of the United States of America for the northern district of New York, in the second circuit, held at the court-house in Canandaigua, on the 20th day of June in the year of our Lord one thousand eight hundred and eighty-two.

Present, the honorable Samuel Blatchford, justice.

FRANKLIN C. CORNELL, AS ADMINISTRATOR, &c.,
vs.
THE UTICA, ITHACA & ELMIRA RAILWAY COMPANY, HENRY S. KING, et al.

The plaintiff having moved this court for an order remanding this action to the supreme court of the State of New York, and said motion coming on to be heard on the 20th day of June, 1882, and on reading and filing the notice of motion and the affidavits and motion thereto annexed, and on the record filed in this court on the 17th day of January, 1882; and upon reading and filing the affidavit of Charles H.

280 Tweed, sworn to on the 19th day of June, 1882, and after hearing J. McGuire, esq., for said motion, and Joseph Choate, esq., opposed thereto, and on motion of S. H. Wilcox, attorney for said plaintiff,

Ordered that the motion to remand this action to the supreme court of the State of New York be granted, and said action is hereby remanded to the said supreme court of the State of New York.

And it is further ordered that the defendant Henry Seymour King pay to this plaintiff the costs of this motion, to be taxed by the clerk of this court.

The foregoing is a resettlement of and in substitution for the order filed herein on the 16th day of August, 1882.

SAM'L BLATCHFORD.

281, 282 (Indorsed:) 3632. U. S. circuit court n. dist. of N. Y. Cornell, adm'r, &c., vs. U., I. & E. R'y Co., H. S. King, et al. Order. Filed Aug. 28, 1882.

283 United States circuit court, northern district of New York.

FRANKLIN C. CORNELL, AS ADMINISTRATOR of the goods, chattels, and credits of Ezra Cornell, deceased,
against
HENRY SEYMOUR KING, IMPLEADED WITH the Utica, Ithaca and Elmira Railroad Company, the Utica, Ithaca and Elmira Railway Company, Henry V. Poor, Thomas N. Rooker, William L. Burt, John Greenough, Henry W. Poor, Joseph Rodbourn, Enos Wilder, and Henry Samuel King.

To the honorable the Supreme Court of the United States:

The appeal of the above-named Henry Seymour King, defendant and appellant, respectfully showeth:

First. That heretofore and on or about the 12th day of February, 1879,

a suit of a civil nature in equity was commenced in the supreme court of the State of New York for the county of Tompkins by the plaintiff above named, against your petitioner and the other defendants above named, and by the complaint in said suit, to which reference is hereby made, the plaintiff demanded judgment among other things that said plaintiff have and receive from the firm of Henry S. King & Company, of which at
284 the time of the commencement of said suit against him your petitioner was the sole surviving partner, an amount of new bonds on the road of the Utica, Ithaca and Elmira Railway Company, equivalent to plaintiff's alleged ownership in the bonds of the Utica, Ithaca and Elmira Railroad Company referred to in the alleged contract mentioned in the said complaint; that your petitioner denies that the plaintiff is entitled to any such relief, or to any relief against him in said suit.

Second. That afterwards and on the 13th day of December, 1881, this appellant presented to and filed with the supreme court of the State of New York, for the county of Tompkins, his petition for the removal of said suit, or of said suit as against him, to this court, to which said petition, a copy whereof is now on file in the office of the clerk of this court, reference is hereby made for the contents and effect thereof; that by such petition for the removal of said suit it appeared as the fact was that heretofore and on or about the twelfth day of February, 1879, a suit of a civil nature in equity had been brought in the supreme court of the State of New York by Franklin C. Cornell, as administrator of the goods, chattels, and credits of Ezra Cornell, deceased, against this appellant impleaded with the Utica, Ithaca and Elmira Railroad Company, the Utica, Ithaca and Elmira Railway Company, Henry V. Poor, Thomas N. Rooker, William L. Burt, John
285 Greenough, Henry W. Poor, Joseph Rodbourn, Enos Wilder, and one Henry Samuel King, who was, however, then deceased; that the plaintiff, at the time of the commencement of said suit was, and ever since had been and then was a citizen of and resident in the State of New York, residing in Ithaca, in said State, and that Ezra Cornell, the intestate of said plaintiff, had been at and prior to the time of his death also a citizen of and resident in said State of New York, residing in Ithaca, in said State; that this appellant was at the time of the commencement of said suit, and ever since had been and then was, an alien and a subject of the Queen of the United Kingdom of Great Britain and Ireland, residing in London, in England; that the defendants, the Utica, Ithaca, and Elmira Railroad Company, and the Utica, Ithaca, and Elmira Railway Company, were, at the time of the commencement of the said suit, and ever since had been and then were, corporations created, organized, and existing under the laws of the State of New York, and citizens of the State of New York, having their principal offices in Elmira, in said State; that the defendants, Thomas N. Rooker, John Greenough, Henry W. Poor, and Joseph Rodbourn, were, at the time of the commencement of said suit and ever since had been and then were citizens of and residents in the said State of New York; the said Thomas N. Rooker,
286 residing in Brooklyn, in said State; the said John Greenough and Henry W. Poor residing in the city of New York, in said State; and the said Joseph Rodbourn, residing in Breesport, in said State; that the defendants, Henry V. Poor and William L. Burt, were, at the

time of the commencement of the said suit and ever since had been and then were, citizens of and residents in the State of Massachusetts, the said Henry V. Poor residing in Brookline, in said State, and the said William L. Burt residing in Boston, in said State; that the defendant Enos Wilder was at the time of the commencement of said suit and ever since had been and then was a citizen of and resident in the State of New Jersey, residing in Madison, in said State, and that the defendant, Henry Samuel King, therein named, had died before the time of the commencement of said suit, but at and prior to the time of his death had been an alien and a subject of the Queen of the United Kingdom of Great Britain and Ireland, residing in London, in England; that the said suit had been brought for the purpose of procuring judgment, among other things, that the plaintiff was entitled to have and receive from the firm of Henry S. King & Company, of which, at the time of the commencement of said suit, this appellant was the sole surviving partner, an amount of new bonds of the railroad of the Utica, Ithaca and Elmira Railway Company equivalent to plaintiff's alleged ownership in the bonds of the Utica, Ithaca and Elmira Railroad
287 Company referred to in the alleged contract mentioned in the complaint in this action; that this appellant denied that the plaintiff was entitled to any such relief, or to any relief in said suit; that said suit was a suit of a civil nature in equity in which there was a controversy between the plaintiff, a citizen of the State of New York, and this appellant, who was an alien and foreign, subject, as in said petition before alleged, and that it was a suit in which there could be a final determination of the controversy so far as concerned this appellant, without the presence of the other defendants as parties in the cause, and that the matter in dispute in said suit exceeded, exclusive of costs, the sum or value of five hundred dollars; that said suit was pending, undetermined, in the said supreme court of the State of New York; that a demurrer on behalf of this appellant had been theretofore interposed, but had been overruled, and that this appellant had served his answer to the complaint of the plaintiff in said suit on the twenty-fourth day of September, 1880, and had on the day on which said petition bears date served his amended answer in said suit; that the said suit had never been noticed for trial, and that there never had been any trial or final hearing thereof, nor any term at which the same could have been tried; and that no application had
288 been theretofore made to any court or judge for the order to be applied for upon such petition.

And, therefore, this appellant prayed for the removal of the said suit into the circuit court of the United States, to be held in the district where such suit was pending, to wit, the circuit court of the United States for the northern district of New York, in the second circuit, and made and filed with said petition a bond with good and sufficient surety for his entering in such circuit court on the first day of its next session, a copy of the record in such suit, and for paying all costs that might be awarded by said circuit court, if said court should hold that such suit had been wrongfully or improperly removed thereto, and also for his there appearing and entering special bail in such suit, if special bail had been originally requisite therein, and also offered good and sufficient surety for his entering in such circuit court, on the first day of its session, copies of all process, pleadings, depositions, testimony, and other proceedings in the cause concerning or af-

fecting this appellant, and also for his there appearing and entering special bail in the cause, if special bail had been originally requisite therein.

And this appellant prayed the honorable supreme court of the State of New York to accept said petition and bond, and such surety, and to proceed no further in such suit or to proceed no further in the cause
289 against this appellant.

Third. That on the said 13th day of December, 1881, there were presented to said supreme court, and filed with said petition bonds in the usual form on behalf of this appellant, which were duly approved and accepted by said supreme court, and thereupon said suit was duly removed into this court, and that thereafter and on the first day of the next session of this court, to wit, on the 17th day of January, 1882, a copy of the record and copies of all process, pleadings, depositions, testimony, and other proceedings in such suit were duly filed in this court on behalf of this appellant, and this appellant duly appeared in said suit in this court; that on or about the 20th day of June, 1882, a motion was made in this court on behalf of the said plaintiff, for an order remanding the said suit to the supreme court of the State of New York, whereupon, after hearing counsel for this appellant and the said plaintiff, the court after due deliberation thereon, on or about the 16th day of August, 1882, made and pronounced an order or decree in the said cause, to which reference is hereby made as a part hereof, whereby it is in substance ordered, adjudged, and decreed that this suit be remanded to the said supreme court of the State of New York.

This appellant shows to the court that the matter in dispute here-
290 in, exclusive of costs, exceeds the sum or value of five thousand dollars.

Wherefore, inasmuch as such order or decree for remanding this cause to the supreme court of the State of New York is as this appellant is advised and believes erroneous, this appellant appeals from the whole of said order and decree of said circuit court of the United States, and respectfully prays that the said order or decree of the said circuit court, and the complaint, petition for removal, bonds on removal, and all the affidavits, papers, and proceedings in said cause may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause anew, and that the said order or decree of the circuit court, and every part thereof, may be reversed with costs, or such other decree made as to the said Supreme Court shall seem just.

EVARTS, SOUTHMAYD & CHOATE,
Solicitors for Appellant.

JOSEPH H. CHOATE,
Of Counsel.

The above appeal is hereby allowed.
Dated September 15, 1882.

WM. J. WALLACE.

(Endorsed:) Filed Sept. 16, 1882.

291 *Bond for damages and costs.*

Circuit court of the United States for the northern district of New York in the second circuit.

FRANKLIN C. CORNELL, AS ADMINISTRATOR OF the goods, chattels, and credits of Ezra Cornell, deceased,

vs.

HENRY SEYMOUR KING, IMPLEADED WITH THE Utica, Ithaca and Elmira Railroad Company, The Utica, Ithaca and Elmira Railway Company, Henry V. Poor, Thomas N. Rooker, William L. Burt, John Greenough, Henry W. Poor, Joseph Rodbourn, Enos Wilder, and Henry Samuel King.

Know all men by these presents that we, Henry Seymour King, as principal, and John Paton and Edward K. Goodnow, as sureties, are held and firmly bound unto the respondents hereinafter mentioned in the sum of five hundred dollars, to be paid to the said respondents, for the payment of which well and truly to be made we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly
292 and severally, firmly by these presents. Sealed with our seals and dated the fifteenth day of September, in the year of our Lord one thousand eight hundred and eighty-two.

Whereas the above-named Henry Seymour King has prosecuted an appeal to the Supreme Court of the United States against Franklin C. Cornell, as administrator of the goods, chattels, and credits of Ezra Cornell, deceased, respondent, to reverse the order or decree rendered in the above-entitled suit by the judge of the circuit court of the United States for the northern district of New York, remanding said cause to the supreme court of the State of New York:

Now, therefore, the condition of this obligation is such that if the above-named appellant shall prosecute his appeal to effect, an answer all damages and costs if he fail to make his appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

HENRY SEYMOUR KING,
By CHARLES H. TWEED, *his Att'y.* [L. S.]
J. PATON. [L. S.]
E. K. GOODNOW. [L. S.]

293 Sealed and delivered and taken and acknowledged this 15th day of September, 1882, before me.

[L. S.] WM. R. MONTGOMERY,
Notary Public, New York County.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

John Paton and Edward K. Goodnow, being severally duly sworn, depose and say, and each for himself deposes and says, that he is worth the

sum of one thousand dollars, over and above all his just debts and liabilities, and resides in the State of New York.

E. K. GOODNOW.
J. PATON.

Sworn this 15th day of September, A. D. 1882, before me.
WM. R. MONTGOMERY,
Notary Public, New York County.

294 *Bond for damages and costs.*

Circuit court of the United States for the northern district of New York in the second circuit.

FRANKLIN C. CORNELL, AS ADMINISTRATOR OF the goods, chattels, and credits of Ezra Cornell, deceased,
vs.
HENRY SEYMOUR KING, IMPLEADED WITH THE Utica, Ithaca and Emira Railroad Company, The Utica, Ithaca and Elmira Railway Company, Henry V. Poor, Thomas N. Rooker, William L. Burt, John Greenough, Henry W. Poor, Joseph Rodbourn, Enos Wilder, and Henry Samuel King.

Know all men by these presents that we, Henry Seymour King, as principal, and John Paton and Edward K. Goodnow, as sureties, are held and firmly bound unto the respondents hereinafter mentioned in the sum of five hundred dollars, to be paid to the said respondents, or either or any of them, for the payment of which well and truly to be made we bind ourselves and each of us, our and each of our heirs, executors,
295 and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated the fifteenth day of September, in the year of our Lord one thousand eight hundred and eighty-two.

Whereas the above-named Henry Seymour King has prosecuted an appeal to the Supreme Court of the United States against Franklin C. Cornell, as administrator of the goods, chattels, and credits of Ezra Cornell, deceased, The Utica, Ithaca and Elmira Railroad Company, The Utica, Ithaca and Elmira Railway Company, Henry V. Poor, Thomas N. Rooker, William C. Burt, John Greenough, Henry W. Poor, Joseph Rodbourn, and Enos Wilder, respondents, to reverse the order or decree rendered in the above-entitled suit by the judge of the circuit court of the United States for the northern district of New York, remanding said cause to the supreme court of the State of New York:

Now, therefore, the condition of this obligation is such that if the above-named appellant shall prosecute his appeal to effect, and answer all
296 damages and costs if he fail to make his appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

HENRY SEYMOUR KING, [L. S.]
By CHARLES H. TWEED, *Att'y.*
J. PATON. [L. S.]
E. R. GOODNOW. [L. S.]

Sealed and delivered and taken and acknowledged this fifteenth day of September, 1882, before me.

WM. R. MONTGOMERY,
Notary Public, New York County.

297 UNITED STATES OF AMERICA,
Southern District of New York, ss:

John Paton and Edward K. Goodnow, being severally duly sworn, depose and say, and each for himself deposes and says, that he is worth the sum of one thousand dollars over and above all his just debts and liabilities, and resides in the State of New York.

E. K. GOODNOW.
J. PATON.

Sworn to this 15th day of September, A. D. 1882, before me.
[L. S.] WM. R. MONTGOMERY,
Notary Public, New York County.

The foregoing bonds are approved.
Dated Sept. 15, 1882.

WM. J. WALLACE.

298 (Indorsed:) 3632. U. S. circuit court, n. d. of New York. Franklin C. Cornell, as administrator of the goods, chattels, and credits of Ezra Cornell, deceased, vs. Henry Seymour King, impleaded with The Utica, Ithaca and Elmira Railroad Company and others. Original petition of appeal and bonds. Evarts, Southmayd & Choate, sol'rs for Henry Seymour King. Filed Sep. 16, 1882.

299 United States circuit court, northern district of New York.

FRANKLIN C. CORNELL AS ADMINISTRATOR OF the goods, chattels, and credits of Ezra Cornell, deceased,
against
HENRY SEYMOUR KING, IMPLEADED WITH THE Utica, Ithaca and Elmira Railroad Company.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

William V. Rowe, being duly sworn, deposes and says that he is a clerk in the office of Evarts, Southmayd & Choate, attorneys for the appellant Henry Seymour King in the above-entitled suit, and is over twenty-one years of age; that at the times and places hereinbelow stated, respectively, he served upon the persons hereinafter mentioned the citation and copy of petition of appeal and bonds on appeal, attached hereto, and that at the time of such respective services he exhibited to each of such persons the said original citation, and delivered to and left with him a copy of said citation and a copy of said petition of appeal and bonds.

Upon Franklin C. Cornell, plaintiff in said cause, personally, at Ithaca, New York, on the 18th day of September, 1882.

Upon Samuel H. Wilcox, attorney for the plaintiff in said suit,
300 personally, at Ithaca, New York, on the 18th day of September, 1882.

Upon N. & M. Niles, attorneys for defendant, John Greenough, by service upon their clerk at their office, No. 155 Broadway, in the city of New York, on the 16th day of September, 1882, the attorneys being absent from said office at the time of such service.

Upon Samuel D. Halliday, attorney for defendant William L. Burt, at Ithaca, New York, on the 18th day of September, 1882, by service upon his clerk at his office, the said Halliday being absent therefrom at the time of such service.

Upon the defendant Joseph Rodbourn, personally, at Breesport, New York, on the 18th day of September, 1882.

Upon the defendant Thomas N. Rooker, personally, at the city of New York, on the 19th day of September, 1882.

Upon defendant Henry W. Poor, personally, at the city of New York, on the 19th day of September, 1882.

Upon defendant Enos Wilder, personally, at the city of New York, on the 19th day of September, 1882.

Upon T. Frank Brownell and Messrs. Wetmore & Jenner, attorneys for defendants Henry V. Poor and Henry W. Poor, at the city of New York, on the 19th day of September, 1882.

301, 302 And deponent further says that at the time of the service of such citation and copies of petition of appeal and bonds upon the persons above mentioned he knew the same to be the persons or the attorneys for the persons mentioned in such citation. And further deponent saith not.

WM. V. ROWE.

Sworn to before me this 28th day of September, 1882.

[SEAL.] WM. R. MONTGOMERY,
Notary Public, New York County.

303 UNITED STATES OF AMERICA, *ss:*

To Franklin C. Cornell, as administrator of the goods, chattels, and credits of Ezra Cornell, deceased, the Utica, Ithaca and Elmira Railroad Company, the Utica, Ithaca and Elmira Railway Company, Henry V. Poor, Thomas N. Rooker, William L. Burt, John Greenough, Henry W. Poor, Joseph Rodbourn, and Enos Wilder, greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States, to be holden at Washington on the second Monday of October, eighteen hundred and eighty-two, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the northern district of New York, wherein Henry Seymour King is appellant and you are respondent, to show cause, if any there be, why the order or decree in the said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated this 15th day of September, 1882.

WM. J. WALLACE,
Circuit Judge.

304 (Indorsed:) United States circuit court, northern district of New York. Franklin C. Cornell, as administrator of the goods, chat-

tels, and credits of Ezra Cornell, deceased, vs. Henry Seymour King, impleaded with the Utica, Ithaca and Elmira Railroad Company and others. Original citation. Evarts, Southmayd & Choate, sol'rs for Henry Seymour King.

Due and timely service of within citation is hereby admitted.

CHARLES H. TWEED,
Sol'r of Utica, Ithaca & Elmira Railroad Company, and Utica, Ithaca & Elmira Railway Company.

(Stamp:) U. S. circuit court, n. d. of N. Y. Filed Sep. 29, 1882. William H. Bright, clerk.

305 UNITED STATES OF AMERICA,
Northern District of New York, ss:

I, William H. Bright, clerk of the circuit court of the United States of America for the northern district of New York, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom, now on file and remaining of record in my office, being a full and complete copy of the record and proceedings in the suit of Franklin C. Cornell, as administrator of the goods, chattels, and credits of Ezra Cornell, deceased, vs. Henry Seymour King, impleaded with the Utica, Ithaca and Elmira Railroad Company.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court, at the city of Utica, in said northern district of New York, this twenty-ninth day of September, in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of the United States the one hundred and seventh.

[SEAL.] WILLIAM H. BRIGHT, *Clerk.*

(Indorsement on cover:) No. 962. Henry Seymour King, appellant, vs. Franklin C. Cornell, administrator of Ezra Cornell, dec'd, The Utica, Ithaca & Elmira R. R. Co., et al. N. New York C. C. U. S. Filed 4th October, 1882.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1882.

FRANKLIN C. CORNELL, *Administrator, &c.*,
APPELLEE,

vs.

HENRY S. KING, APPELLANT,
Impleaded, &c.

Brief in Reply for King, Appellant.

I. The construction put by the respondent upon the first clause of Sec. 639 R. S. is too narrow.

The suit is still "a suit against an alien and a citizen of the State in which the suit is brought," within the meaning of that clause, notwithstanding the presence of other defendants, citizens of other States. The cardinal feature of the provision is the joining of the alien as a defendant with a citizen or citizens of the State where the suit is brought. The incidental circumstance of citizens of other States, or other aliens, being also defendants does not matter.

It might as well be claimed that the clause only applies to a case where there is only *one* alien defendant and *one* other defendant, a citizen of the State in which the suit is brought.

It is submitted that the construction should be fair and reasonable, so as to include all cases *substantially* complying with its terms.

II. The brief of the appellee clearly concedes that as to King's controversy with the plaintiff there can be a final determination of it without the presence of the other defendants as parties in the cause; that, in fact, with that controversy they have nothing whatever to do.

That is the main point. If that is so, the case is within the statute.

What he insists and we deny is, that because King might be held, on demurrer for misjoinder, a *proper* party to the suit for the determination of the plaintiff's controversy with the other defendants, he cannot remove it.

But, as Mr. Justice BLATCHFORD clearly pointed out in *Stevens* vs. *Richardson*, 9 Fed. Rep., 191, "*that is a question not affecting the matter of removal.*"

It is true, as claimed, that King is interested in the *question*, how many of the old bonds are "held and owned" by the plaintiff, but that does not make him an *indispensable* party in the suit for the determination of all the accounts and questions in controversy between the plaintiff and the other defendants.

It is the convenience of the plaintiff only that dictates the joining of King as a defendant for that purpose. He wishes to bind King by the result of his accounting with the others.

But it is not necessary that he should be so joined or so bound.

That question, so far as it concerns King, can just as well be tried in the separate suit with King. In fact, it must

be tried separately as to King, in either mode of trial. Suppose collusion between the plaintiff and the other defendants; suppose a false admission by them of Cornell's ownership of *all* the old bonds; that will not bind King, whether he remains in the suit as co defendant, or goes out by removal of the cause into the Circuit Court. Whether in or out, it will still be his right to require the plaintiff, as against him, to establish that he owns or holds the old bonds for which he claims new ones.

Such an admission would entitle the plaintiff to judgment against the defendant who made it, but not against King, whether he remains in the suit or goes out.

It is not correct to say that the question as to the number of the old bonds "held and owned" by the plaintiff "*can only be heard in this case* in connection with the other defendants." (Appellee's brief, p. 11.) It can and must be determined, as against King, as a direct issue between the plaintiff and King. Whether King's case is tried in the same or in a separate suit, the same proofs which would entitle the plaintiff to judgment against the other defendants would not entitle him to judgment against King.

Suppose King and all the allegations about King's separate agreement, with which it is conceded the other defendants have nothing to do, to be struck out of the complaint, could the other defendants plead the non-joinder of King in bar? Clearly not. It is only by an unnecessary mixing up of the two controversies in one complaint that any color is given for the claim that they constitute but one.

Suppose a replevin suit by the plaintiff against the other defendants for the recovery of the old bonds; nobody would claim that it could not be tried, and the right as between those parties determined, without King's presence. So here, the question of title between the plaintiff and the other defendants can be tried in equity without him.

However desirable it may be to the plaintiff to keep him

in as a defendant, so as to bind him by the judgment and save trouble to the plaintiff, inasmuch as it must be conceded that his separate controversy can be determined, *so far as concerns him*, without the presence of the other defendants, we submit that the appellant has made out a clear case for removal of the suit as to him.

III. The appellee's brief, on the question of the repeal of Section 639, seems directed rather to show what Congress ought to have done, or might reasonably have done, than what it has actually done by the act of 1875.

He does not claim that the latter act is a complete revision of the whole subject-matter, or that it prescribes the only rule of action on the subject of removal; nor does he attempt to show any inconsistency between the retention of the provision as to aliens in the act of 1866, and the new provisions as to citizens of different States in the act of 1875, or that the two *cannot* stand together.

He argues the improbability of Congress intending to preserve rights of removal to aliens which it denies to citizens. But why is that any more improbable than what he claims, viz.: that Congress intended to shut out aliens altogether, by the omission in the act of 1875, from any right of removal at all, where they have a separate controversy with the plaintiff?

We have nothing to do with the question of policy or expediency, or with any "manifest intention of Congress," except what is made manifest by their acts.

We find that by the act of 1866 they gave a certain right of separate removal to aliens, and to citizens of different States, from the plaintiff's State; that by the act of 1875 they took that right away from the citizens of different States by substituting for it, as to them, a larger and better

right, the removal of the whole cause, but made no provision whatever about aliens in the like case, and only repealed "all acts and parts of acts in conflict with this act," thereby, according to the settled principles governing repeals, leaving the aliens just where they stood before.

We submit that, without overruling the authorities cited in our original brief, it cannot be held that there is any repeal by the act of 1875, of the clause in the act of 1866, as to aliens, under which we claim this removal.

All the cases cited by the appellee are cases where removal was attempted, not by an alien, but by citizens of States different from the plaintiff's. The peculiar condition of the statutes, as to aliens, was not brought to the attention of the Court, was not involved in the cases, and cannot be deemed to have been passed on in the decisions. What we claim in regard to each of those decisions is not that it decides merely the particular case, but only cases coming within the same rule and principle; and that none of them have any bearing on the question of the right of the alien, who is provided for by the act of 1866, but not at all by the act of 1875.

EVARTS, SOUTHMAYD & CHOATE,
Attorneys for Appellee.

JOSEPH H. CHOATE,
Of Counsel.

IN THE

Supreme Court of the United States.

FRANKLIN C. CORNELL, AS ADMINISTRATOR, &C.,
Appellee,

vs.

HENRY S. KING, *Appellant*, IMPLEADED WITH THE UTICA, ITHACA AND ELMIRA RAILROAD COMPANY AND OTHERS.

Brief on behalf of Henry S. King, Appellant, on appeal from order of the Circuit Court of the United States for the Northern District of New York remanding cause to the State Court.

Statement of Facts.

This action was originally commenced in the Supreme Court of the State of New York, the plaintiff being a citizen of the State of New York, the defendant Henry S. King, appellant here, *being an alien*, a citizen of Great Britain, and other defendants being, like the plaintiff, citizens of the State of New York.

In January, 1882, the appellant King filed his petition and bonds in the State Court for the removal of the cause into the Circuit Court. The petition and bonds conformed to the requirements of section 2 of the Act of March 3d, 1875, and also of the 2d clause of section 639 of the Revised Statutes (the same being the re-enactment of the Act of 27th July, 1866, commonly known as the Splitting Act).

The Circuit Court (Mr. Justice Blatchford presiding) remanded the cause, holding that the suit was not removable under the Act of 1875; not under the 1st clause of the 2d section, because it was not a suit in which there was a controversy between citizens of different States, and also because all the parties defendant did not petition for the removal; nor under the 2d clause, because it was not a suit in which there was a controversy wholly *between citizens of different States*, and which could be fully determined as between them. The Circuit Court further held that it was not removable under the 2d clause of section 639 of the Revised Statutes, because this court, in *Hyde* v. *Ruble*, 3 Morr. Tr. Rep., 516, had decided that section to be repealed by the Act of March 3d, 1875 (*Vide* opinion of Blatchford, J.)

The appellant here concedes that the case was not removed under the 2d section of the Act of March 3d, 1875. Not under the 1st clause, because all the parties defendant did not join in the petition; nor under the second, because the phrase "controversy between citizens of different States," as there used, is not large enough to embrace a controversy to which one of the parties is an *alien*. He rests this appeal solely upon the 2d clause of section 639 of the Revised Statutes, and claims, first, that the provision there contained for the removal of controversies to which one party is an *alien* is not repealed by the Act of March 3d, 1875; and second, that it is a suit removable as against the alien defendant upon his sole petition, under the 2d clause of that

section, because it is "a suit against an alien and a citizen of the State wherein it is brought in which there can be a final determination, so far as it concerns him (*the alien*), without the presence of the other defendants as parties in the cause."

The complaint sets forth a cause of action in equity against all the defendants other than King, based upon a contract entered into between them, and to which he was in no way a party.

It is alleged that Ezra Cornell, the plaintiff's testator, being the contractor for the construction of the Utica, Ithaca and Elmira Railroad, for which he received the bonds issued by the company, and having proceeded as far as the bonds enabled him to go, had suspended work upon the road, having incurred large liabilities, for which bonds were pledged by him, among others, to certain of the other defendants, and being also largely indebted to the company, whereupon, in October, 1874, in order to sell the bonds and raise money to complete the road, he entered into a written contract with all the parties defendant other than King, which contract it is the object of the action as against the defendants other than King to enforce, and to obtain an accounting and settlement as between all those parties under its provisions, to establish his ownership of the bonds held by the other parties to the contract, and to obtain possession of the same.

The terms of the contract are set forth in full in the complaint. By its terms Cornell, as contractor for the building of the road, is discharged from all indebtedness and liability; the company is to assume the construction; the personal claims of the other defendants against him are released, and they accept in lieu thereof the obligation of the company secured by its mortgage bonds. Schedules of these various debts are to be annexed. All the mortgage bonds issued belonging to all the parties are to be sent to England for sale by the defendant Greenough, an agent employed to sell them at prices fixed by the agreement, he to have half of

whatever he got for the bonds in excess of such fixed prices. The proceeds of the sale of the bonds are to be applied, first, to the redemption of the bonds pledged by Cornell and the payment of the debts thereby secured, supposed to amount to $250,000; the next $250,000 to the construction and completion of the railroad; then to pay Cornell's debts to the other defendants, and the whole remaining balance to go to Cornell. The defendants Poor and Rooker are made trustees under the contract for the sale of the bonds, the receipt and application of the proceeds.

Having set forth the terms of the contract, the complaint goes on to allege that Burt's account against Cornell, as stated in the schedule furnished by him, was fraudulently made up and exaggerated to more than double its true amount; that Ezra Cornell, the testator, died immediately after the making of the contract; that the parties entered upon the performance of the contract; that bonds to an amount not less than $946,000 were sold by Greenough, for not less than $634,335, leaving about 400 of the bonds unsold, of which the trustees are accountable for 341, as also for the entire proceeds of the bonds sold; that the trustees fraudulently conspired together to divert the funds to purposes unauthorized by the contract; that they claim to have paid on account of Cornell's debts $311,794.38, whereas they did not exceed, with interest, $300,000; that they claim to have paid to the company for construction $240,000, a large part of which is disputed by the plaintiff; that upon their own showing they have upwards of $200,000 of proceeds on hand to account for; that the defendants Burt and Rodbourn, creditors of Cornell, have received out of the bonds sold more than enough to pay their debts; that many unlawful payments have been made out of the fund by the trustees at the request of, and in collusion with, Burt; that Greenough wrongfully withholds some of the bonds and proceeds; and the object of the action as to all

these defendants, other than King, parties to the contract, is to enforce its provisions, and to compel an accounting between them all thereunder, and a final settlement and payment of the balances due in bonds and money. With all these matters the defendant King has no concern and nothing whatever to do. Neither have the other defendants anything to do with the cause of action stated against King, which arises out of facts wholly distinct, and is as independent and separate a matter as if it had been the subject of a separate action.

It appears by the other allegations of the complaint relative to King, that in the year 1877, default having been made in the payment of the interest due upon the mortgage bonds of the company, foreclosure proceedings were commenced, and prosecuted to a decree of sale; that King had become the purchaser in England of all the bonds sold there; that before the sale under the foreclosure, King agreed with the plaintiff to buy the road for joint account with him, to reorganize it into a new company, which should issue to each of them new bonds secured by its new mortgage, one new bond of the same amount for each old bond held; that King purchased accordingly; and that King and the new company, which is wholly owned and controlled by King, formed by him upon the reorganization, under the name of the Utica, Ithaca and Elmira Railway Company, which is made also a defendant, are ready and willing to carry out the agreement by the issue of new bonds, in lieu of the plaintiff's old bonds, but are unable to do so until the ownership of said old bonds is settled, and the respective rights of the parties adjudged. The only relief asked against King is that the plaintiff be adjudged to have and receive from King and the new company an amount of new bonds, equivalent to plaintiff's ownership in the old bonds.

King, by his answer, denies that he made any such agreement with the plaintiff as is alleged in the complaint, and insists that he purchased the road on the

foreclosure sale on his own account, and without any trust or liability in favor of the plaintiff, and that is the issue to be tried between them—an issue with which none of the other defendants have anything to do.

Various proceedings took place in the State Court; three successive interlocutory injunctions were obtained by the plaintiff against King; King demurred to the complaint for misjoinder of causes of action and of parties defendant, and his demurrer was overruled in the State Court, and he answered over.

But as the question here involved rests upon the pleadings, and as the removal under the second clause of section 639 may be had at any time before final hearing, further reference to the proceedings in the State Court is not deemed to be material.

First Point.—The second clause of section 639 of the Revised Statutes, so far as it secured to an *alien* defendant, sued jointly with a citizen of the State, the right to a separate removal of the cause as to him, is not repealed by the Act of March 3d, 1875.

Because the Act of 1875 only expressly repeals all acts and parts of acts in conflict with its own provisions, an implied repeal can certainly go no further; and there is no possible conflict between that provision of the second clause of section 639 and the entire Act of 1875, which simply *omits to provide* for the case of the alien covered by the former act.

It could not have been the intent of Congress, in passing the Act of 1875, to deprive an alien defendant, party to a separate controversy with the plaintiff, of the right which had been secured to

him by the Act of 1866, to remove the suit as to him into the Federal Court, when they were confirming and enlarging the similar right to the defendant, who was a citizen of a different State from the plaintiff. Whatever reason exists for giving such right at all to any party, exists in its fullest force in favor of an *alien* defendant.

If, as is possible, and quite probable, the omission of aliens from the second clause of section 2 of the Act of 1875, was an accidental oversight, then certainly the provision existing in their behalf in the 2d clause of section 639, R. S., was not in the minds of the Legislators, as being in conflict with the Act of 1875, and repealed by its 10th section. But the theory of the law will not permit the court to impute oversight to the Legislature. It must presume that that body had in mind all the previous enactments on the subject, and intended no repeal, except of such portions thereof as were absolutely repugnant in their provisions.

The Act of 1875 is not, and does not purport to be, as to removals, a complete and exhaustive revision of the whole subject matter. It wholly omits, for instance, all reference to local prejudice in the State courts, for which the right of removal was given, by the Act of 1867 (Cl. 3d, sect. 639, R. S.).

So far as it covers the ground covered by previous acts, and provides for the same cases, either by the same, or altered, or enlarged provisions, it might be held to repeal them, but no farther, without larger express words of repeal than those in section 10.

The precise question here presented has not arisen before, viz.: the case of an alien.

But several of the circuits have gone much further in holding the laws of 1866 and 1867 un-

repealed as to cases provided for by either of them, and not provided for by the Act of 1875.

Judge DILLON states the matter thus (Dillon on Removals, 3d Ed., p. 29): "Cases may arise of such a nature that they would fall within the Act of 1866, and not within that of 1875, in which event the latter Act should not be held to repeal by implication the former. The *third* subdivision of that section [639, R. S.] (corresponding to the Act of 1867), is broader than the Act of 1875, provides for a class of cases not provided for by that Act, and while the point is not free of doubt, the true view seems to be that, at all events, this portion of the 639th section remains unrepealed."

In *Girardey* vs. *Moore*, 5 Cent. Law J., 78, Mr. Justice MILLER held that even in the case of a defendant citizen of a different State from the plaintiff, there was no repeal of the Act of 1866, putting it upon the difference between the two acts; that in the former it was restricted to the right to remove the cause only as to the single defendant, while in the 2d cl., 2 sect., Act of 1875, the right given extended to a removal of the whole cause.

In *Wormser* vs. *Dahlman*, 16 Blatch., 322, Mr. Justice BLATCHFORD, in a similar case, adopted and approved this ruling.

In *Cook* vs. *Ford*, 4 Cent. Law J., 560, Mr. Justice BALLARD held that the 3d section of 639, R. S., was not repealed by the Act of 1875, which position again Mr. Justice BLATCHFORD, affirmed in *Sims* vs. *Sims*, 17 Blatchf., 369, and Dillon, p. 29, states that this has been decided to be so, in the 8th Circuit, by Mr. Justice MILLER, and generally in the courts of that circuit, and so far as we are advised by the circuits elsewhere.

Vide., this decision, *Arrapahoe Co.* vs. *Kansas Pacific R'way Co.*, 4 Dill., 287.

In *Hyde* vs. *Ruble*, 3 Morr. Tr. Rep., 519, this court said: "The second clause of § 639 of the R. S. was, as we think, repealed by the Act of 1875."

This must be accepted as decisive in the case there involved, which was that of a controversy between citizens of different States, and to that extent, but to that extent only, as overruling the decisions in the Circuit Court already cited. But it had no reference to the case of an *alien* provided for by the 2d clause of § 639, R. S., but wholly omitted in the Act of 1875. The attention of the court was not drawn to the case of an alien at all, and that case is left wholly untouched by the decision.

The decisions above quoted from the Circuit Court, which are left unreversed, do distinctly demonstrate that the act of 1875 is not to be regarded as a complete and exhaustive revision of the whole subject matter of removals. Else, it would have swept away the 3d clause of § 639, R. S., which is conceded to be still in force.

On general principles regulating the doctrine of implied repeal of statutes, the same thing cannot be held in the case of the alien.

If both statutes *can stand together*, there is no repeal express or implied.

What possible inconsistency is there between the right of an *alien* defendant, in a given case, to remove the case as to him, and that of a citizen of a different State, from that of the plaintiff in a similar case, to remove the whole cause?

So regarded, the question does not bear discussion.

Clearly there is no repeal.

All parts, of course, or any part of the Act of 1866, not in conflict with the Act of 1875, are preserved, or so much of it as it is "*possible to reconcile*" with the latter act.

McCool vs. *Smith*, 1 Black, 459.

A repeal ought not to be presumed unless from the repugnance of the provisions the inference be *necessary and unavoidable*. So far as provisions *may* stand together, they *must*.

Harford vs. *U. S.*, 8 Cranch, 109.

Unless the court can say that the Act of 1875 clearly intended to prescribe *the only rules* which should govern removals, even as to aliens, who are omitted from it, there is no repeal as to them.

Davies vs. *Fairbarn*, 3 How., 636.

Even where there is apparent conflict between the acts, it is the recognized duty of the court to reconcile them, as far as may be, on any fair hypothesis. But here, as to the omitted aliens, it is impossible to point out any conflict.

Beals vs. *Hale*, 4 How., 37.

The repugnancy and conflict in the later law must be manifest and total to work a repeal.

Wood vs. *U. S.*, 16 Peters, 342.

Can they possibly stand together? If they can, they must.

The Distilled Spirits, 11 Wall., 356.

Second Point.—If, then, the 2d clause of sections 639 stands unrepealed, the remaining question is not that which was decided by Mr. Justice BLATCHFORD, in the Circuit, and in deciding which he appears to have followed the decision of the State Court on the demurrer for misjoinder:—whether King was a proper party, but simply, as prescribed by the very language of the act, "Can there be a final determination of the controversy so far as concerns

King, without the presence of the other defendants as parties in the cause?"

This question, we submit, can only be answered in the affirmative.

It is not the ordinary question of proper parties, and the true test for its decision was suggested in the cases above cited, viz.:—Would an action lie against King alone, upon the facts alleged in the bill?

Not whether King is a necessary party to the determination of the controversy between the plaintiff and the other defendants; *but are they necessary parties to his controversy?*

(*a.*) The controversy between King and the plaintiff is absolutely distinct from that between the other defendants and the plaintiff, and is one with which they have no possible concern. It rests upon distinct facts having no relation to those involved in that other controversy.

The question whether King made the agreement in respect to the organization alleged against him in the complaint, not only *can* but *must* be determined without the presence of the other defendants as parties in the cause. In its determination they can take no part, and by it they cannot be affected.

Could not the plaintiff, immediately after the reorganization, have commenced an action alleging the same facts against King alone, and asking the same relief as to him?

Doubtless it is a great convenience *to the plaintiff* to unite both his controversies in one suit, so as to bind all of the defendants by one decision of the question:—how many bonds he is entitled to as between himself and the other defendants? but that is a mere question of convenience; a question of proper parties in the settlement of their separate controversy; it by no means makes the other defendants necessary

parties in the trial of King's separate controversy.

The obvious and natural course of the plaintiff would be to try, first the controversy between himself and the other defendants, and thereby determine how many bonds of the old company he is entitled to, and to get possession of them; and afterwards the controversy with King, and thereby determine whether, as to him, and as to him alone, he is entitled to an exchange of bonds, new for old.

In such regular and orderly prosecution of the matter, neither King nor the other defendants would have anything to do with the trial of the other's controversy; and this the same whether there were one suit or two. If all in one suit, the court could not try both issues together. It must postpone the trial of King's controversy till the other was determined. Or if King were sued alone, as he might have been, without any suit against the other defendants, the plaintiff could perfectly well establish his title to the old bonds, if that alone were sufficient, upon proof of his agreement with King, to entitle him to the new.

(*b.*) But probably the true construction of his claim against King, as alleged, is that he has, and claims, no cause of action against King, except and until he is able to tender for exchange old bonds to which he has already, before the tender, established his ownership and obtained possession.

This is the way he declares, viz.:—that King agreed "that the new company should give to the plaintiff bonds of said new company covered and protected by said mortgage for the exact equivalent, bond for bond, of the bonds under the foreclosed mortgage held or owned by the

plaintiff." Certainly, he cannot be said in law to "*hold*" or "*own*" bonds to which he can only acquire ownership by a final accounting between him and the other defendants.

In this aspect of the case it is impossible to claim either that King has anything to do with determining that ownership as between the plaintiffs and the other defendants, or that the other defendants have anything to do, after the plaintiff has established against them his ownership of the old bonds, and possessed himself of them, with determining whether he shall have from King alone an exchange of new bonds for the old.

There is one distinct controversy about the old bonds, and another entirely distinct controversy as to the plaintiff's right to have from King new bonds for as many old bonds as he may tender as his own.

Certainly, nothing could be more apparent than the hardship and injustice either of compelling King to attend and take part in the settlement of the former, in which he has no concern, or the other defendants to attend and take part in the latter, in which they have no concern.

(*c.*) Viewing the question, thus, in its true light, as one to determine, not whether King might be a proper party to the suit for an accounting as between the plaintiff and the other defendants, as the Circuit Court viewed it, but to determine whether the plaintiff can try his case against King, without the presence of the other defendants, the cases decided in this court are strongly in our favor.

The language used by this court in *Barney* vs. *Latham*, 103 U. S., 214, is exactly applicable:

"Such a controversy does not cease to be one

wholly between the plaintiff and these (petitioning) defendants, because the former, for their own convenience, choose to embody in their complaint a distinct controversy between themselves and the land company."

It is respectfully submitted that the present controversy between the plaintiff and King can just as plainly and certainly be tried without the presence of the other defendants as parties in the cause, as in that case the controversy between the individual defendants and the plaintiffs could be tried without the presence of the Land Company. "Separate suits, each distinct in itself, might have been properly brought on these two separate causes of action, and complete relief afforded in each suit as to the particular controversy involved."

Hyde v. *Ruble*, 3 Morr. Tr. Rep., 519.

The same may be said as to *Stevens* v. *Richardson*, 9 Fed. Rep., 191 :

"Whether there is or is not such a connection between the various transactions set out in the complaint as to make all of the defendants proper parties to the suit, and to every controversy embraced in it, at least in such a sense as to protect the complaint against a demurrer for multifariousness or misjoinder, *is a question not affecting the matter of removal.*"

BLATCHFORD, J., p. 193.

That is, in fact, the only question which was passed on in the State Court. It arose on such a demurrer. Did not the learned judge at Circuit err in accepting its decision by the State Court as conclusive on *this* question of removal arising not under the Act of 1875, but under clause 2 of § 639 R. S.?

Third Point.—Under the 2d clause of § 639 R S., the case was also removable at the instance of King, the alien defendant, because, "*so far as relates to him, it was brought for the purpose of restraining or enjoining him.*"

The motion to remand, as appears by the notice, exhibits injunction after injunction obtained in the State Court by the plaintiff against King: *First*, to stay any issue of bonds. *Second*, to stay any payment of interest on his bonds. *Third*, to stay any issue of stock to him.

It is true that these injunctions were not prayed for as part of the relief demanded by the complaint, but by the practice in New York, it was not necessary that such prayer should be inserted. The proceedings in this case demonstrate that the suit may be brought for the purpose of enjoining or restraining a particular defendant without such prayer.

By successive injunctions the defendant King has been placed under most stringent and wholesale restraint as to all the bonds involved in the controversy between him and the plaintiff. These injunctions are not merely incidental. They go to the root of the whole matter.

Fourth Point.—The order appealed from, remanding the cause to the State Court, should be reversed, and the cause directed to proceed as to King in the Circuit Court.

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OFFICE SUPREME COURT U. S.
FILED
OCT 16 1882
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16-395

IN THE

SUPREME COURT

OF THE UNITED STATES.

IN THE SUPREME COURT OF THE UNITED STATES.

FRANKLIN C. CORNELL, AS ADMINISTRATOR, &c.,
Appellee,
vs.
HENRY S. KING, IMPLEADED WITH THE UTICA, ITHACA AND ELMIRA RAILWAY COMPANY, AND OTHERS,
Appellant.

Brief on behalf of Franklin C. Cornell, appellee, on appeal from an order of the Circuit Court of the United States, for the Northern District of New York, remanding cause to the State Court.

Statement of Facts as claimed by the Appellee.

This action was brought in the month of July, 1878, in the Supreme Court of the State of New York, against the Utica, Ithaca and Elmira Railroad Company. The Utica, Ithaca and Elmira *Railway* Company, Henry V. Poor, Thomas N. Rooker, William L. Burt, John Greenough, Henry W. Poor, Joseph Rodbourn, Henry Samuel King and Henry Seymour King, the Appellee.

All of the defendants, including the railroad corporations, are, and were, at the time of the commencement of the action, citizens of the State of New York, except the defendant Burt, who was a citizen of the State of Massachusetts, the defendant Wilder, who resided in the State of New Jersey, and the Appellant King, who then was, and still is, an alien residing at London, England, in the kingdom of Great Britain.

One purpose of the action was for an adjudication compelling the specific performance of an agreement made between the complainant and the defendant King, on the 30th day of April, 1878, but the manner and extent of performance, and the relief to be granted, depended and depends upon a prior contract, of date October 29th, 1874, made between Ezra Cornell, the intestate of the plaintiff, the Utica, Ithaca and Elmira Railroad Company, William L. Burt, Joseph Rodbourn, and to which the said Henry V. Poor, Thomas N. Rooker and John Greenough became parties.

The facts stated in the pleadings are somewhat complicated, but it is apprehended that there is no difficulty in understanding their meaning and import.

They are substantially: That prior to the 29th day of October, 1874, a line of railroad was in process of construction, extending from Cortland to Elmira, a distance of 71 miles, being built by the corporation defendant, the Utica, Ithaca and Elmira Railroad Company. That Ezra Cornell, the intestate of the plaintiff, was the contractor for such construction, and advanced the money necessary for that purpose. That in payment for his advances the corporation issued to Mr. Cornell its first mortgage bonds upon the road. That Mr. Cornell advanced largely from his private means, and incurred large obligations in borrowing money necessary to be used in such construction.

The defendant, Burt, was the president of the corporation, and its general manager, and made large claims against the intestate. The defendant, Rodbourn, had made advances to considerable of an amount. After a time Mr. Cornell could not or would not advance from his private resources, and the bonds not being saleable in the American markets, and the road being uncompleted, and money being required to effect the completion, an agreement was entered into on the 29th of October, 1874, between the Railroad Corporation, Cornell, Burt, Rodbourn, Poor, Rooker and Greenough, which agreement is set forth in the bill of complaint.

Mr. Cornell at this time was the owner of 1,365 bonds of $1,000 each, less 18, in the hands of one Wood. These bonds were placed in the hands of the defendants Poor and Rooker as trustees, and the defendant Greenough was constituted an agent to proceed to England to sell them.

The contract provides for the disposition of the

proceeds, and after the payment therefrom of certain claims, to wit, those of Burt and Rodbourn and others, the balance of the proceeds, and any bonds unsold, were to be paid over to Mr. Cornell.

Some of these bonds were sold to a firm, of which the defendant King was a partner, to what amount the case does not disclose.

While this trust continued, and before any adjustment as provided for in the contract took place, and in November, 1877, for default in payment of interest, a foreclosure of the mortgage which secured the payment of the bonds referred to, was commenced, judgment was entered therein, and upon the 30th day of April, 1878, a sale of the road was had thereunder. Mr. Ezra Cornell in the meantime had died, and his estate, and the defendant King being the owners of all, or nearly all, of the bonds thus issued, an arrangement was entered into, that King should bid off the road at a nominal sum, a new company to be formed, and the new company, through King, was to deliver to plaintiff its bonds, secured by a first mortgage, to an amount equal to the bonds held in the old company, bond for bond. This arrangement, in so far as the sale, &c., was concerned, was carried out.

A new company was formed on the 8th day of May, 1878, and the articles of association filed in the Secretary of State's office on the 10th day of May of the same year, said King being, in fact, the owner and controller thereof.

On account of the unsettled condition of the trust created by the contract, and the refusal of the said persons to render any account of the number of bonds sold, or on hand, or of the disposition of the

proceeds of sale, it was impossible to determine the amount of bonds the plaintiff should receive from the new company, the Utica, Ithaca and Elmira Railway Company; hence this action is brought for an accounting to ascertain and determine how many of said bonds remain in the hands of Poor, Rooker and Greenough, and what they have done with the proceeds of such as they have sold, and to ascertain what part thereof Burt and Rodbourn are entitled to under the contract.

It is only upon this accounting and adjustment of rights and equities between the plaintiff and the other defendants that the new company, or King, is called upon to act, and the manner and extent of their action is governed and controlled wholly and exclusively by such adjustment. In fact no relief whatever, is asked against King, except such as is based thereon.

There may be, and undoubtedly, are, some matters alleged in the complaint, such as the amount of money in the hands of the trustees, for which an accounting is demanded, or an accurate statement of accounts between the plaintiff and the defendant, in which King has but little, if any, interest, but as to the number of bonds in the hands of Poor, Rooker and Greenough, or the number still unsold by them, the defendant King as well as the Railway Company has a direct personal interest, and upon which he has a right to be heard. It is of important interest to him whether he, through his railway company, issues to the plaintiff one bond or three hundred bonds. His interests in that respect are so interwoven with those of the other defendants, that they cannot be separated.

The defendant King, upon being served with process, interposed to the complaint a demurrer upon the same ground that the removal of the cause to the Federal Court is sought to be upheld, that is to say, that he was not a necessary party to the controversy alleged in the complaint. In other words, that a separate independent cause of action, was set forth against the other defendants against whom a final determination of the controversy could be had without his presence, and *vice versa*.

The demurrer was overruled by the State Courts, and King was not only held to be a proper, but necessary party, by those Courts—King thus litigating this question in the State Courts for nearly three years, and being unsuccessful, then files in December, 1881, his petition for the removal of the case to the Federal Courts, and an order is entered upon the petition of King alone, removing the case, as to all of the defendants.

It is not easy, from the petition, to determine under what Statute, and upon what grounds the removal is based. King alleges that he is an alien and a subject of the Queen of the United Kingdom of Great Britain and Ireland. The residence of the plaintiff and of the other defendants is given, showing them to be citizens of the States of New York, Massachusetts and New Jersey—a general reference is made to the nature of the action, and then it is averred that the controversy is between a citizen of the State of New York, and an alien as aforesaid, and that a final determination of the controversy can be had between King and the other defendants in the action.

It is, however, alleged that a demurrer was interposed to the complaint, and overruled. That an issue of fact was joined September, 1880, and that on the 17th day of March, 1881, an amended answer was served. That the issue thus joined has not been noticed for trial, nor has there been any term since the service of the amended answer, at which the cause could have been tried.

This seemed to indicate that the removal was sought under Section 639 of the Revised Statutes, and also under Chapter 137 of the Laws of 1875.

The counsel for the appellant now, in his filed brief, disclaims any right to remove under the latter act, but solely bases the right under the said section 639, the second clause thereof.

Point First.

Even upon the assumption that the second clause of Section 639 stands unrepealed, this case is not within the provisions of that act.

(a.) Section 639 provides, 1st: When the suit is against an alien and a citizen of the State where the suit is brought, or 2d, by a citizen of such State, against a citizen of the same, and a citizen of another State, it may be removed, &c.

The word alien only occurs in the first part of the sentence, and he has the right to apply for a removal when he is joined with a citizen of the State in which the action is brought.

In this case the alien is not only joined with such citizen, but with citizens of other and different States.

A strict and fair construction or interpretation of the provisions of this section, necessarily excludes an alien from availing himself of the privilege of removal, where he is joined with citizens of divers States ; his right and his remedy is confined to that class of cases, where a suit is brought in a State Court, whether by a resident or non-resident plaintiff against a citizen of the State in which the action is brought, and an alien ; then the latter, in a case provided for by the subsequent provisions of the section, can remove the case to the Federal Court.

The terms of the act, it is submitted, are not broad enough to warrant a removal in this case.

(b.) But if this construction should be regarded as too narrow, then the appellant has not brought himself within the provisions of the act.

The action is not *brought* to enjoin or restrain the alien from doing anything as erroneously suggested by the learned counsel for the appellant in their brief.

The purpose of the action is to compel the doing or performance of an obligation—not to enjoin or restrain.

It is true the complaint prays an injunction, *pendente lite*—a mere provisional remedy—to restrain the transfer or parting with during the pendency of the action, the subject matter of the litigation, without which any judgment might be rendered ineffectual. But enjoining or restraining is no part of the final relief demanded.

When the action "is brought for the purpose, &c.," is the language of the Statute, when the real purpose of the action, and the ultimate relief sought, is the restraining act of the Court by its judgment, then the case would be within the terms of the Statute, but when the provisional remedy is temporarily invoked, then the act has no application.

(c.) And neither has the appellant brought his case within the other provisions of the section: viz: that a final determination of the controversy can be had between the plaintiff and the appellant King, without the presence of the other defendants.

The position of the learned counsel for the appellant seems to be and has been, through all of the litigation in the State tribunals, that the complaint alleges a separate and distinct cause of action against King, which can be separately tried and prosecuted to judgment against him, without the presence of the other defendants, and in which they have no interest.

This, it is submitted, is a mistaken view of the theory and object of the action as expressed by the allegations of the complaint.

Whether the agreement set forth in the complaint as made between plaintiff and King, that the railroad should be bid off by him, a new company to be formed, and bonds of the new company to be issued to each in the same amount, bond for bond,

as each respectively held in the old company; there is no doubt but that the existence of such an agreement, or its making could be determined without the other defendants being parties to the record.

If King had agreed to issue and deliver to Cornell a certain and definite number of bonds, then the action could well have proceeded against King alone.

But such was not the agreement—no number or amount was agreed upon. Cornell was to receive the same number and amount of bonds to which he was entitled in the old company, and that number could only be determined by an adjustment of the rights of the other defendants, under the contract of October 29th, 1874, which is made a part of the complaint.

King, therefore, necessarily became interested in the accounting and adjustment between the plaintiff and the other defendants under the aforesaid contract—that accounting and that alone would determine the number of bonds which the appellant King was to deliver to the appellee Cornell.

This accounting and ascertainment of the number of bonds which Mr. Cornell was entitled to receive from Mr. King was an element considered by these parties in the making of the contract, and entered into and formed a part thereof, and this adjustment

is so connected and interwoven with the undertaking by King to deliver bonds as to be inseparable and incapable of division into parts or "splitting up" into sections.

By way of illustration: Suppose the action should proceed against King alone, either in the Federal or State court, what judgment could be entered against him? When the statute speaks of the "final determination of the controversy" it evidently refers to the judgment to be entered.

To separate King from the other defendants, it will be seen that no judgment whatever could pass against him.

It might be determined whether he and the plaintiff made the agreement alleged in the complaint; that is as far as you could go. Upon that no judgment could be entered.

The important and controlling fact as to the number of bonds which King shall be adjudged to deliver is still wanting. That can only be ascertained by the presence of the other defendants, and hence the necessity and materiality of this case being tried as a whole, and not in parts.

King is interested, and has a right to be heard as to the number of bonds which he may be called upon to deliver to the plaintiff. And he can only be heard in this case in connection with the other defendants.

There are two questions in the controversy, the first of which is, Did King make the agreement alleged? That part of the case is peculiar to himself and the plaintiff.

If so, how many bonds shall he deliver? In the solution of that question all of the defendants are directly and inseparably connected.

Poor, Rooker and Greenough were charged with the detention or conversion of some 300 bonds of $1,000 each, issued by the old company.

It is further charged, that the appellant King agreed to deliver to the plaintiff bonds in the new company to the amount and number of those which it might be determined these three persons, or either of them, had detained or converted.

It is remarkably strange, and certainly an untenable position, for Mr. King now to assume that he has no interest in the ascertainment of the number of bonds which the other defendants are to account to the plaintiff for, whether one bond or three hundred.

He has to deliver whatever the number may be as found by the determination. It can be seen at a glance that King practically, and in fact, has more interest in the decision of that question than the other defendants. And it is equally clear that no final determination of the controversy can be had without a determination of the number of bonds King is to deliver. And to the complete determination of that part of the case King is not only a necessary but an indispensable party—all of the defendants being necessarily joined to effect a final determination.

It is not to be supposed that this plaintiff and the other defendants can, by collusive or other improper practices, procure a determination that shall be binding or conclusive upon King of a larger number of bonds than the plaintiff is justly entitled to receive. Yet such is the logic and natural result of the appellant's argument, viz.: that King has no interest in that part of the litigation.

Mr. King has the right in this equity action, where all these parties are necessarily joined for a full and final determination of the controversy, to contest and insist that no determination shall be made against his co-defendants of a greater number of bonds than the plaintiff is justly, honestly and equitably entitled to receive under the contract of October 29, 1874. And upon such determination of the number it is then, and only then, that King becomes obligated to perform.

The State Court, as this Court will see by an examination of the opinion of Mr. Justice Bockes, who delivered the opinion of the Court upon an appeal from the order overruling the demurrer, squarely placed its decision upon the ground that upon the facts alleged in the complaint, and in the judgment demanded upon those facts, King was not only a proper but a necessary, indispensable party to effect a final determination of the controversy therein involved, and Mr. Justice Blatchford was right in following and giving full credit and effect to this decision.

The decision of the State Court was not placed

upon the narrow ground now urged by the appellant, that King was merely a proper party, but upon the broader ground that King was a necessary party; that although there were two parts to the controversy, they were so joined and blended together as to be in fact but a single controversy, in which all of the defendants were jointly interested in its determination.

It is respectfully submitted that the State Court was correct in its decision that Justice Blatchford committed no error in giving it effect, and upon principles of comity this Court should observe the rule there stated by the deliberate judgment of the Court pronounced.

It is further submitted, that this case does not fall within the principle of Barney v. Latham, 103 U. S., 205, and cognate cases, for the reasons hereinbefore suggested.

Point Second.

The case as presented on this appeal is relieved from the embarrassment suggested by the terms of the petition, and which was incident to the case when the motion to remand was made in the Circuit Court.

The appellant now disclaims, in his printed brief, any right of removal under the act of March 3,

1875, but places his right so to do under the second clause of section 639 of the Revised Statutes.

The learned counsel for the appellant further simplifies the discussion, and the question presented, by conceding that this Court has decided in the case of Hyde vs. Ruble, 3 Morrison's Transcripts, 516, that the aforesaid second clause is repealed by the act of March 3, 1875, in so far as citizens of different States are concerned, but that said clause as to aliens stands unrepealed and in force.

Upon this alleged distinction between the remedies of a citizen and those of an alien this appeal is founded.

(a.) This distinction, it is submitted, is inadmissible and untenable.

The second clause of the act of 1866, being section 639 of the Revised Statutes, for the first time interpolated into our jurisprudence very incongruous and anomalous provisions in regard to the "splitting up" of actions and allowing one part of a controversy to be tried in one forum and the remainder in another.

The confusion and embarrassment, with all of its attendant inconveniences and the increased costs to litigants which resulted from this species of legislation, became so serious in its operation as to imperatively demand a change.

Yielding to this demand and its necessity, the act March 3, 1875, was passed with this title:

> "An act to determine the jurisdiction of the
> "Circuit Courts of the United States, and

"to regulate the removal of causes from
"State Courts, and for other purposes."

The second section of this act gives the right of removal, where the controversy is between citizens of different States, or where such exists between citizens of a State and foreign States, citizens and subjects. This latter clause includes aliens as subjects of a foreign State, and are thus included within the provisions of the act.

The appellant King does not claim the right to remove under this act, but as before stated, his position is, that on account of his *alienage* he possesses rights of removal, which are denied to citizens of the various States; that is, the remove as to himself, leaving the case in the State Court, as to the other defendants—to divide and subdivide the action into sections.

No citizen now possesses this right, and it is difficult to see why an alien should.

There is not, nor has there been, any conflict of opinion in the construction of the act of 1875, that in case of removal, the whole suit is transferred to the Federal Court, and not a part thereof, as under the act of 1866.

The intention of Congress to make this change, is so apparent as to lead Mr. Justice Harlan to remark in the case of Barney vs. Latham, 103 U. S., 205:

"That such was the intention of Congress, is a

proposition which seems too obvious to require enforcement by argument. While the act of 1866 expressly requires the removal to that part of the suit which specially relates to or concerns the defendant seeking the removal, there is nothing whatever in the act of 1875, justifying the conclusion that Congress intended to leave *any part of a suit* in the State Court, where the right of removal was given to, and was exercised by, any of the parties to a separate controversy therein."

This, and many other cases unnecessary to cite, expressly declare that the purpose of the act of 1875, was to expunge from the Statute the anomalous practice of "splitting up," and thus leaving a part of a cause to be tried in one Court and a part in another.

This the appellant contends is true as to citizens, but not as to aliens. That the alien's right of removal under section 639 of the Revised Statutes is unaffected by the provisions of the act of 1875.

This position is sought to be upheld, and the contention of the appellant is that the right of an alien under the act of 1866 to remove a cause as to himself is not inconsistent with or repugnant to any of the provisions of the act of 1875. That, as the statute only repeals such acts, or parts of acts, as are inconsistent, both can stand together, and effect given to each.

If the act of 1866 is still operative as to the right of an alien to remove, can any good reason be given why the same right is not secured to the citizen? If it was the obvious intention of Congress to so legislate by the legislation of 1875, in providing for removals, so as to leave no part of the case in the State Court (the whole whole suit to be transferred or none,) how can it be claimed that Congress only accomplished a part of its intention? Abrogating an important provision respecting its own citizens, but leaving them in force in favor of subjects of a foreign power.

Why this discrimination in favor of the alien against one to the manor born?

No reason can be given, nor is one sought to be given, by the learned counsel in their brief.

The evil to be remedied by the act of 1875, viz.: the severance of actions and trials in different tribunals, applied with equal force to actions where an alien was joined with citizens of the State where the suit was brought, as to those cases where citizens of other States were joined; and it must have necessarily been within the intention of Congress to abrogate the whole system of dividing or splitting up actions, whether the suit was against an alien or citizens of different States, and this Court has emphatically so declared that the act of 1875 forbids the division of a case for trial.

It may be, as the appellant suggests, that the act of 1875 is not a complete and exhaustive revision of the whole subject matter relating to removals. The

local prejudice act of 1867 is not included in its provisions, and such act is not repealed by an omission of a reference to it.

The title to the act of 1875 is quite broad, indicating the intention of Congress, and it is quite clear that whatever subjects the act of 1875 does treat of, it is a "complete and exhaustive revision" of that subject, and plainly and intentionally abolished the system of a division of actions, whether by an alien or citizen.

(b.) The second clause of section 639 U. S. is repealed so far as sub-dividing the cause of action.

Hyde vs. Ruble, 3 Morrison Tr. 356. 104 U. S. Rep. 407

Clark vs. Ch. M. & St. P. R. W. Co., 11 Fed. Rep. 355.

These cases should dispose of this appeal, and lead to an affirmance of the order appealed from.

It is, however, earnestly contended that the repeal is only of a part and not of the whole clause, and that this Court did not, in the case of Hyde vs. Ruble, *supra*, decide the point now presented by the appellant.

There is no qualification or limitation to the decision in Hyde vs. Ruble, as we understand it. It is a broad, comprehensive decision that the aforesaid second clause of the act of 1866 is repealed by the

subsequent act of March 3, 1875, and that no removal whatever from the State to the Federal Court can be had under that clause. All removals, except under the local prejudice act, must be under the act of 1875. Such we understand to be the purport of decisions, *supra*. No removal in any case is permissible under the second clause of the act of 1866.

The suggestion of the appellant that the decision in Hyde vs. Ruble is only decisive of that particular case, is without force or merit. The Court was called upon distinctly to pass upon the question whether a removal, not in that particular case, upon any peculiar facts, but in any case, could be had under the act of 1866, and the question is now, we submit, *res adjudicata*.

The question of alienism was not specifically before the Court. The parties were citizens of different States, and so in the cases of Wormser vs. Dahlman, 16 Blatchford, 319, and Girardy vs. Moore, 3 Wood C. C. Rep., 397, and in fact all of the cases cited by the appellant, were cases of citizens of different States, and in those cases it was held that the act of March 3, 1875, does not repeal that part of the act of July 27, 1866, which authorizes one defendant, if a citizen of another State, to separate his case from that of the other defendants, who are citizens of the State where the suit is brought, and remove it to the Federal Court.

In all these cases it was argued, as here, even in cases of citizens, that there was no necessary conflict between the acts of 1866 and 1875, and that both could stand together. All of those decisions thus

cited by the appellant are overruled by this Court in the subsequent case of Hyde vs. Ruble, *supra*, and it now must be taken as the accepted and settled rule that the second clause of the act of 1866 is unqualifiedly repealed.

The same sentence in the clause referred to gave to the citizen and the alien the same right of removal in the case, and under the conditions therein specified ; no distinction whatever was made between the alien and citizen, and a construction of the act of 1875 would be novel as well as remarkable that a single sentence in the clause mentioned, giving certain rights to certain classes of persons, should be repealed as to some and remain in force as to the other, especially when the subject matter now claimed to be unrepealed is what the subsequent legislation intended to abrogate.

It is very evident that it was not the intention of Congress, in the act of 1875, to place aliens upon an equality with citizens in the matter of removals. All of the rights that he had before the act of 1866 were preserved and continued by the act of 1875.

The first named act gave to the alien equally with the citizen a new right or remedy, that of separating a case. The act of 1875 took from the citizen this right, and it done nothing more to the alien. Congress conferred it on both by the act of 1866, it took it from both by the act of 1875.

It is not necessary to inquire what the right of the alien would be under the act of 1875, if an action was brought against him, and nominal defendants joined, citizens of the State in which the action was brought; whether he could remove the entire case or not, under the clause, "or a controversy between "citizens of a State and foreign States, citizens or "subjects," because it is conceded by the appellant that he is not in a position to move under that act, the record showing that he would have been barred by the lapse of time.

The removal is sought by the defendant King, under the second clause of the act of 1866 for himself alone, leaving the case, as to the other defendants, in the State Court.

The manifest intention of Congress was to do away with the practice of a division of actions in all cases allowed by the act of 1866, and if the alien was deprived of a right secured to him by such act, at the same time a citizen was also deprived of the same right, and the fact that the act of 1875 made provision that in a "controversy which is *wholly* between citizens of different States and which can be fully determined as between them," then either of the parties actually interested may remove said suit, &c., is no evidence of an intention on the part of Congress to allow an alien to separate a case by a removal of a part to the Federal Court.

Point Third.

Upon the grounds, 1st, That this is not a severable action; and 2d, That the second clause of the act of 1866 is repealed and no longer in force, the order appealed from should be affirmed.

S. H. WILCOX,
Att'y for the Plaintiff.